ORAL ARGUMENT NOT SCHEDULED

No. 15-1166 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WALTER COKE, INC., *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for Review of Final Action by the
United States Environmental Protection Agency

RESPONDENT EPA'S FINAL ANSWERING BRIEF

JOHN C. CRUDEN
Assistant Attorney General

DAVID J. KAPLAN
MATTHEW R. OAKES
DUSTIN J. MAGHAMFAR
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
Phone: (202) 514-0997
Email: david.kaplan@usdoj.gov

Of Counsel:

Geoffrey L. Wilcox
United States Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., NW
Washington, DC 20460

Additional counsel listed on following page

October 28, 2016

Of Counsel:

Paul Bangser
Sheila Igoe
Steven Odendahl
Zachary Pilchen
Kristi Smith
Jan Tierney

United States Environmental
Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., NW
Washington, DC 20460

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Respondents state as follows:

A. Parties and Amici.

All parties, intervenors, and amici appearing in this court are listed in the Brief for Industry Petitioners.

B. Rulings Under Review.

References to the rulings at issue appear in the Brief for Industry Petitioners.

C. Related Cases.

Respondents are not aware of any related cases.

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GLOSSARY

CAA or Act	Clean Air Act, 42 U.S.C. §§ 7401-7671q
EPA	United States Environmental Protection Agency
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standard
PSD	Prevention of Significant Deterioration, 42 U.S.C. §§ 7470-7479
RTC	Response to Comments
SIP	State Implementation Plan
SSM	Startup, shutdown and malfunction
SSM Action	"State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction." 80 Fed. Reg. 33,840 (June 12, 2015)

STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to 42 U.S.C. § 7607(b)(1).

STATEMENT OF THE ISSUES

Clean Air Act ("CAA") section 7410(k)(5) authorizes EPA to issue a call for revision of State Implementation Plans ("SIPs") "[w]henever the Administrator [of EPA] finds that the applicable implementation plan for any area is substantially inadequate" to comply with any CAA requirement. Petitioners the State of Florida, et al. ("State Petitioners"), Walter Coke, Inc., et al. ("Industry Petitioners") and the State of Texas, et al. ("Texas Petitioners") challenge the "SIP Call" issued by Respondent United States Environmental Protection Agency ("EPA") for specific existing provisions in the SIPs of 36 States, raising these issues:

1. Under the CAA, States are required to adopt continuous enforceable emission limitations and other control measures necessary to meet all applicable CAA requirements. Given this requirement, did EPA reasonably issue the SIP Call for specific SIP provisions that create exemptions to emission limitations, or otherwise provide that such limitations cannot be enforced?

2. The CAA allows courts to impose a range of remedies for violations of the Act. 42 U.S.C. §§ 7413(b), (e); 7604(a). Can a State, through its SIP, divest the court of its jurisdiction to determine liability or impose any of the statutorily-available remedies for violations?

3. An agency may change its statutory interpretation unless a court has established that the prior interpretation is the only permissible reading of the statute. The Fifth Circuit, under *Chevron* step two, previously upheld EPA's interpretation upon partially approving an affirmative defense SIP provision. Is EPA prohibited from advancing and implementing a different interpretation of the Act for affirmative defense provisions in the SIP Call?

4. Did EPA reasonably construe its authority under section 7410(k)(5) upon finding the specific SIP provisions substantially inadequate to comply with applicable legal requirements of the Act and thus properly issue the SIP Call?

PERTINENT STATUTES AND REGULATIONS

Some frequently cited authorities not in Petitioners' addenda are included as an addendum to this brief.

STATEMENT OF THE CASE

Petitioners seek review of the final action titled, "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction." 80 Fed. Reg. 33,840 (June 12, 2015) ("SSM Action"). The SSM Action concerns how provisions in EPA-approved SIPs treat emissions from sources that exceed otherwise applicable limits (that is, excess emissions) during startup, shutdown or malfunction ("SSM") events or other modes of operation. In the SSM Action EPA reiterated, clarified and revised its interpretations of the CAA regarding requirements for SIP provisions applicable to excess emissions due to SSM events.

EPA also analyzed specific SIP provisions and issued a finding that provisions in 36 States fail to meet CAA requirements.

Accordingly, EPA issued a "SIP call" requiring each of those 36 States to cure identified legal inadequacies in their respective SIPs. EPA reasonably determined that the SIP-called provisions are inconsistent with fundamental CAA requirements, including that: 1) emission limitations must apply during all modes of a source's operation without exemptions; 2) SIPs cannot be revised without compliance with the CAA's substantive and procedural requirements for SIP revisions; and 3) SIP provisions cannot interfere with the Act's provisions for enforcement, such as by precluding EPA or citizens from pursuing enforcement or by divesting federal courts of their jurisdiction to determine liability and impose appropriate remedies.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The CAA generally

The CAA establishes a comprehensive program for controlling and improving the nation's air quality through combined state and federal regulation. EPA must identify air pollutants that endanger public health and welfare and formulate National Ambient Air Quality Standards ("NAAQS") establishing permissible concentrations of those pollutants in the ambient air. 42 U.S.C. §§ 7408-09.

Each State, through a SIP, must provide for "implementation, maintenance, and enforcement" of the NAAQS. *Id.* § 7410(a)(1). SIPs must meet specific requirements including public notice, legal authority, resources and substantive emission controls. *Id.* §§ 7410(a)(1), (2). A SIP must include enforceable "emission limitations" and other control measures as necessary or appropriate to meet all CAA requirements. *Id.* § 7410(a)(2)(A); *see also id.* §§ 7410(a)(2)(B)-(M) (setting forth further SIP requirements). "Emission limitation" is defined in part as a requirement "which limits the quantity, rate, or concentration of emissions of air pollutants on a *continuous* basis." *Id.* § 7602(k) (emphasis added); *see, e.g.*, *Sierra Club v. EPA*, 551 F.3d 1019

(D.C. Cir. 2008) (holding that section 7412 emission limitations must apply continuously).

States must adopt enforceable "emission limitations" to meet various CAA requirements. For example, "nonattainment" areas violate (or contribute to violations of) a NAAQS. 42 U.S.C. § 7407(d). Part D of the CAA contains general requirements for all nonattainment areas, as well as specific requirements for particular criteria pollutants. *Id.* §§ 7501-7514a. Nonattainment-area plans must include emission limitations as needed to provide for attainment of the NAAQS as expeditiously as practicable. *Id.* § 7502(c)(6). These emission limitations provide the basis for other required components of a nonattainment-area plan, such as accurate emissions inventories and reliable modeling demonstrations. *Id.* § 7502(c)(3).

SIPs must include "a program to provide for the enforcement" of SIP provisions "to assure that [NAAQS] are achieved." 42 U.S.C. § 7410(a)(2)(C). Enforcement of emission limitations is critical to ensuring attainment and maintenance of the NAAQS. The CAA provides for EPA administrative or judicial enforcement, *id.* § 7413, and citizen enforcement, *id.* § 7604. Citizen suit enforcement in federal court is

available where any person allegedly violates "an emission standard or limitation," as defined in section 7604(f). Federal enforcement is available for a range of violations, including where any person has violated requirements of a SIP. *Id.* § 7413(b)(1). Federal district courts have jurisdiction conferred by the Act to determine liability, enforce emission limitations and SIP requirements, and impose a range of remedies, including compliance orders, injunctive relief and penalties. *Id.* §§ 7413(b); 7604(a).

The efficacy of a State's program to assure attainment and maintenance of the NAAQS and to meet other requirements is evaluated through computer modeling that assumes that sources of emissions will continuously comply with those limitations. *See, e.g.*, 40 C.F.R. § 51.112(a)(1). Thus, compliance with emission limitations is a crucial element of SIPs, and enforcement is a vital tool to ensure compliance.

EPA must evaluate SIP submissions for compliance with CAA requirements and can approve, disapprove, or conditionally approve such submissions wholly or partially. 42 U.S.C. § 7410(k)(3)-(4). EPA may not approve a SIP revision that would interfere with NAAQS

attainment "or any other applicable requirement" of the Act, and may not approve a SIP revision with respect to certain requirements pre-dating the 1990 CAA Amendments, without meeting certain specified conditions. *Id.* § 7410(*l*), 7515. After EPA approves a SIP requirement for a stationary source, a State may not (with certain limited exceptions) modify it without going through the SIP revision process and obtaining EPA's approval. *Id.* § 7410(i); *Duquesne Light Co. v. EPA*, 698 F.2d 456, 468 n.12 (D.C. Cir. 1983). Once EPA approves emission limitations and control measures, they are federally enforceable. 42 U.S.C. § 7413.

B. New Source Review SIP Requirements

The Prevention of Significant Deterioration ("PSD") program, *id.* §§ 7470-92, is intended "'to ensure that the air quality in attainment areas or areas that are already 'clean,' will not degrade.'" *Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. 461, 470 (2004) (citation omitted). Major sources must obtain PSD permits prior to construction or modification of large pollutant-emitting facilities, and the applicants are required to demonstrate that the proposed source will not cause a violation of the NAAQS or "PSD increments" (*i.e.*, limits on increases in

ambient pollution concentrations over specified area-specific baseline concentrations). *See* 42 U.S.C. §§ 7473, 7475(a)(3), 7476. The source must also implement the "best available control technology" to limit emissions of regulated pollutants. *Id.* § 7475(a)(4).

For nonattainment areas, major new and modified sources are subject to the more stringent Nonattainment New Source Review requirements. *Id.* §§ 7502, 7503. Such sources must meet the Lowest Achievable Emission Rate and must offset increased emissions. *Id.* §§ 7502(c)(5), 7503.

C. New Source Performance Standards

In addition to the health-based NAAQS, which are implemented through SIPs, Congress authorized EPA to promulgate technology-based standards for new and modified stationary sources. *Id.* § 7411(a)(2). EPA bases these New Source Performance Standards on the degree of emission limitation achievable through the application of the best system of emission reduction which the Administrator determines has been adequately demonstrated, taking costs and other factors into account. *Id.* § 7411(a)(1).

D. Standards for Hazardous Air Pollutants

Under section 7412(c), EPA is required to list source categories for major sources of hazardous air pollutants and set National Emissions Standards for Hazardous Air Pollutants for each source category under section 7412(d). These standards must require the maximum degree of reduction in emissions of the relevant pollutants achievable, taking costs and other factors into account, and must meet minimum stringency requirements. *Id.* § 7412(d)(2). These standards must apply on a continuous basis, including during SSM events. *Sierra Club*, 551 F.3d at 1027-28.

E. SIP Call Authority

Section 7410(k)(5) authorizes EPA to issue what is commonly called a "SIP call" in three different contexts, including those in which EPA finds the SIP is "substantially inadequate ... to otherwise comply with any requirement" of the CAA. *See, e.g., US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1168 & 1170 (10th Cir. 2012) (EPA's SIP call authority may apply "where EPA determines that a SIP is no longer consistent with the EPA's understanding of the CAA").

EPA, when issuing a SIP call, must identify a SIP's inadequacies and set a deadline of no more than 18 months for the State to make a

SIP submission to cure the deficiencies. 42 U.S.C. § 7410(k)(5).[1] If the State fails to make, or EPA disapproves, the required submission, then EPA must promulgate a Federal Implementation Plan within two years. *Id.* § 7410(c)(1).

F. EPA's Past SSM Policies

There is a long history of EPA guidance to States concerning the proper approach to regulating emissions during startup, shutdown or malfunction ("SSM") events in SIP provisions. *See* Legal Mem. at 8-14 (JA415-21). Over time, States have adopted different types of SIP provisions to address excess emissions[2] during SSM events. Often these provisions exempted sources from compliance during SSM events.

EPA has long interpreted the CAA to bar States from including exemptions from compliance with applicable emission limitations during SSM events in SIP provisions. EPA has reiterated and

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[1] SIPs must provide for revisions under certain circumstances, including when EPA issues a SIP call. 42 U.S.C. § 7410(a)(2)(H).

[2] "Excess emissions" are emissions in excess of the amount allowed by an applicable SIP emission limitation. *See* 80 Fed. Reg. at 33,877/1.

elaborated upon this interpretation in a series of guidance documents on SSM events issued in 1982, 1983, 1999, and 2001.[3]

EPA has recognized that sources may, despite proper design, maintenance and operation, be unable to meet the otherwise applicable emission limitations during periods of startup and shutdown. Where appropriate, EPA has acknowledged that States may elect to impose alternative emission limitations for such modes of operation. EPA has also recognized that sources may suffer malfunctions due to events beyond their control. EPA's guidance has consistently recommended that States address such violations through their traditional enforcement discretion on a case-by-case basis. EPA later suggested that States, through SIP provisions, could specify factors States may consider when exercising their enforcement discretion. Critically, such state enforcement decisions cannot preclude enforcement by EPA and/or citizens. *See* 1982 and 1983 Guidance, (JA388-92, 393-97).

EPA's guidance is based in part upon section 7410(a)(1)-(2), which requires that SIPs provide for attainment and maintenance of the

[3] *See* "1982 Guidance" (JA388-92); "1983 Guidance" (JA393-97); "1999 Guidance" (JA398-407); "2001 Guidance" (JA432-33).

NAAQS and meet all other applicable CAA requirements. *See, e.g.*, (Attachment to 1982 and 1983 Guidance at 1) (JA390, 395) (explaining that an automatic exemption for a malfunction might aggravate air quality such that the SIP no longer provides for attainment of the NAAQS). EPA also bases this interpretation upon section 7602(k)'s requirement that emission limitations must limit pollutants on a continuous basis. 80 Fed. Reg. at 33,886/1.

In its 1999 Guidance, EPA interpreted the Act to authorize narrowly drawn SIP provisions allowing a limited affirmative defense for violations for excess emissions. (JA398-407). Such defenses could not limit injunctive relief. EPA explained that in an enforcement action a source should have the burden of proof to qualify for the defense by demonstrating it met enumerated factors (for example, that excess emissions were not part of a recurring pattern indicating inadequate source design, operation or maintenance).

Subsequent judicial decisions have influenced EPA's statutory interpretations, and in the SSM Action EPA clarified, updated and restated its guidance to States, superseding the four prior guidance documents. 80 Fed. Reg. at 33,976/3; *id.* at 33,976/2-82/2.

II. FACTUAL BACKGROUND

A. EPA's Proposed Rule

EPA initiated the SSM Action partly because of an administrative petition filed by Sierra Club in 2011 requesting that EPA reexamine its CAA interpretations for treating excess emissions during SSM events in SIP provisions, and to evaluate specific existing provisions in specified SIPs. 78 Fed. Reg. 12,460, 12,464/3-65/3 (Feb. 22, 2013) ("Proposed Rule"). In evaluating the petition, EPA recognized the need to update and clarify its SSM Policy. *Id.* at 12,477/1-82/2. EPA further recognized that it had previously approved SIP provisions that it should not have approved and which fail to meet CAA requirements. *Id.* at 12,464; 80 Fed. Reg. at 33,889/1; Legal Mem. at 8-9 (JA415-16).

EPA proposed to partly grant and partly deny the petition. 78 Fed. Reg. at 12,463/3-64/3. EPA proposed to find specific SIP provisions in 36 States to be substantially inadequate, and proposed to issue a SIP call giving States 18 months to submit SIP revisions to remove or otherwise modify those defective provisions. *Id.* at 12,466-67. At the proposal stage, however, EPA did not interpret the CAA to preclude all affirmative defense provisions. EPA then believed that a "narrow affirmative defense for malfunction events" was permissible in SIP

provisions. *See* 78 Fed. Reg. at 12,470/1. This view was consistent with EPA's 1999 Guidance and EPA's 2010 action on a Texas SIP submission. Specifically, EPA partially approved and disapproved Texas' SIP submission—disapproving an affirmative defense applicable to planned maintenance, startup, or shutdown, but approving an affirmative defense applicable to malfunctions. 75 Fed. Reg. at 68,989/2-69,002/1 (Nov. 10, 2010). The Fifth Circuit upheld EPA's action in *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 845 (5th Cir. 2013).

B. EPA's Supplemental Proposal

After EPA's Proposed Rule, this Court issued a significant decision regarding the legality of affirmative defense provisions for violations during malfunctions. In *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) ("*NRDC*"), this Court reviewed a challenge to EPA's regulation setting emission standards under section 7412. *Id.* at 1057. As part of these standards, EPA promulgated an affirmative defense making penalties unavailable where, in an enforcement proceeding, sources could demonstrate that an emissions violation was due to an unavoidable malfunction and met additional criteria. *Id.* This

Court vacated EPA's affirmative defense provision, holding that the plain language of the CAA gives district courts sole authority in enforcement proceedings to determine whether a penalty is appropriate. *Id.* at 1063-64.

The *NRDC* decision prompted EPA to reconsider the legal basis for affirmative defense provisions in other CAA programs, including SIPs. 79 Fed. Reg. 55,920, 55,931/2-35/1 (Sept. 17, 2014) (Supplemental Proposed Rule). EPA determined that this Court's reasoning in *NRDC* logically extends to affirmative defenses in SIP provisions. *Id.* EPA therefore reevaluated the affirmative defense provisions in its original proposal and reviewed additional affirmative defense provisions identified by EPA, including the affirmative defense for malfunctions that EPA had previously approved in the Texas SIP. *Id.* at 55,936/1. After review, the Agency issued the Supplemental Proposed Rule, proposing to: 1) amend its CAA interpretations regarding affirmative defenses in SIP provisions; 2) find such provisions in 17 States substantially inadequate; and 3) issue a SIP call for these provisions. *Id.* at 55,925.

C. EPA's Final Action

In the SSM Action, EPA responded to the Sierra Club petition; reiterated, clarified, and finalized certain revisions[4] to its guidance to States concerning SIP provisions that address SSM events; and applied its interpretations to specifically-identified SIP provisions in States nationwide. 80 Fed. Reg. at 33,840.

EPA evaluated SIP provisions in detail on a State-by-State, provision-by-provision basis, and determined that certain provisions in 36 States were substantially inadequate to meet statutory requirements, and thus issued a SIP Call for those provisions. *Id.* at 33,959-74; 78 Fed. Reg. at 12,474/2. The unlawful provisions fall into four major types, discussed below. 80 Fed. Reg. at 33,957-59.

1. Automatic Exemptions

"Automatic exemptions" exempt sources from compliance with emission limitations during SSM events or other modes of operation. *Id.* at 33,957/3. As a result, emissions in excess of applicable emission limitations are defined not to be a violation of, and are unregulated by,

[4] The only significant change in EPA's SSM Policy was the determination that affirmative defense provisions are inconsistent with CAA requirements. 80 Fed. Reg. at 33,956/2.

the emission limitation. *Id.* As EPA has consistently stated since at least 1982, SIPs cannot exempt excess emissions during SSM events. 80 Fed. Reg. at 33,957/3. Such exemptions are inconsistent with the Act's requirement that emission limitations be "continuous." *See id.* at 33,874/3; *Sierra Club,* 551 F.3d at 1027-28.

Although EPA based the substantial inadequacy findings on the SIP-called provisions' legal deficiencies, *see infra* Argument III(A), the record illustrates real-world consequences of provisions that exempt sources from emission limitations. 80 Fed. Reg. at 33,874/3; Legal Mem. at 22-24 (JA429-31). For example, exemptions interfere with the air quality objectives at the heart of the CAA, such as attaining and maintaining NAAQS, protecting PSD increments, and protecting visibility. 80 Fed. Reg. at 33,874/3. Sources may emit large amounts of pollutants during SSM events. Legal Mem. at 22-24 (JA429-31); *see also US Magnesium,* 690 F.3d at 1163 (observing that excess emissions "during malfunctions can be significant, with one plant releasing three times its daily limit of sulphur dioxide over a nine-hour period"); 76 Fed. Reg. 21,639, 21,643/2 (Apr. 28, 2011) (examples). Excess emissions during SSM events may not be measured and tracked carefully or

consistently. Legal Mem. at 22-24 (JA429-31). Cumulative excess emissions during SSM events may render emission inventories inaccurate, hindering a State's ability to design adequate SIPs. *Id.* at 22-24 (JA429-31). Because emission inventories are critical to many air quality programs under the CAA, inaccurate inventories may substantially impact a State's ability to meet CAA requirements. *Id.* at 22-24 (JA429-31); *see also id.* at 9 (JA416).

SIP provisions that interfere with effective enforcement by States, EPA or citizens adversely impact public health by reducing incentives for compliance. 80 Fed. Reg. at 33,874/3; Legal Mem. at 22-24 (JA429-31).[5] The loss of deterrence diminishes the benefit of the CAA's enforcement structure in assuring better compliance with applicable emission limitations. Legal Mem. at 22-24 (JA429-31).

With this backdrop, EPA analyzed SIP provisions for consistency with EPA's interpretation of the statute. EPA issued the SIP Call to 15 States for automatic exemption provisions. For example, EPA SIP-

[5] *See also* Legal Mem. at 17-18 (JA424-25) (discussing the example in *Sierra Club v. Georgia Power Co.*, 562 F.3d 1116 (10th Cir. 2009), of the consequences of SIP provisions pertaining to SSM events that are inconsistent with CAA requirements).

called West Virginia's provision providing that limitations on visible emissions "shall apply at all times except in periods of start-ups, shutdowns and malfunctions." W.Va. Code R. § 45-2-9.1; 78 Fed. Reg. at 12,499/1, 501/1.

EPA also denied the Sierra Club petition with respect to possible automatic exemption provisions in several States. *See, e.g.*, 80 Fed. Reg. at 33,961/1, 64/1 (challenged provisions in D.C. and South Carolina applied to specific source categories not subject to emission imitations in the SIPs); *id.* at 33,971/1, 71/2, 844/3 nn.8&9 (SIP provisions in North Dakota and Wyoming corrected after publication of the Proposed Rule).

2. Director's Discretion Provisions

"Director's discretion" provisions authorize state officials to revise SIP emission limitations unilaterally and without EPA approval. Like automatic exemptions, these provisions can result in exemptions for excess emissions, except at the discretion of state personnel. 80 Fed. Reg. at 33,957/3. The result is the same: excess emissions are exempted and the applicable emission limitations do not apply continuously.

The SIP-called director's discretion provisions operate in a variety of ways. For example, some confer upon state regulatory personnel the

discretion to exempt excess emissions on a case-by-case basis,[6] whereas others allow for ongoing, essentially permanent exemptions during SSM events.[7] 80 Fed. Reg. at 33,957/3-58/1. Some provisions may require some minimal process or put parameters on the use of discretion.[8] *Id.* All of the SIP-called director's discretion provisions give state personnel the authority and the discretion to deem excess emissions—a violation of an applicable SIP emission limitation—not to be a violation. *Id.* at 33,957/3.

Discretionary exemptions for excess emissions pose the same set of problems as do automatic exemptions: interference with the Act's air quality requirements, preclusion of enforcement, and elimination of deterrence. *Id.* at 33,874/3-75/1, 33,958/1. While States certainly have authority to reasonably apply their *own* enforcement discretion, director's discretion provisions go further, allowing the director to deem

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[6] *See, e.g.*, 78 Fed. Reg. at 12,500/3 (case-by-case provision in West Virginia SIP).

[7] *See, e.g.*, 78 Fed. Reg. at 12,495/2-3 (Delaware SIP provision allowing state official to revise SIP limits for sources in permits).

[8] *See, e.g.*, 78 Fed. Reg. at 12,506/1 (Kentucky SIP provision authorizing state official to exempt excess emissions if specified criteria are met).

certain exceedances not to be a violation of the SIP. *Id.* at 33,958/1. This impermissibly limits EPA and citizen suit enforcement. Importantly, unbounded director's discretion provisions also authorize state personnel to revise EPA-approved emission limitations without complying with the CAA's process for revising a SIP, including submitting a SIP revision for approval by EPA. *Id.*

EPA issued the SIP Call to 18 States because of impermissible director's discretion provisions in their SIPs, and denied the Sierra Club petition with respect to two jurisdictions. *See* 80 Fed. Reg. at 33,959/1-2 (New Hampshire); 33,963/2-3, 844 n.7 (Jefferson County, Kentucky).

3. Overbroad Enforcement Discretion

EPA also included in the SIP Call provisions that restrict the ability of EPA or citizens to bring enforcement actions. Since at least 1983, EPA acknowledged that States may adopt SIP provisions that impose parameters on their *own* discretion to initiate enforcement proceedings in certain circumstances.[9] *See* 80 Fed. Reg. at 33,875/1, 33,958/1. EPA evaluated "enforcement discretion" provisions to

[9] States may not so cabin their enforcement ability, however, as to violate section 7410(a)(2)(C)'s requirement that SIPs provide for a "program for enforcement."

determine whether they permit state officials to determine that excess emissions did not constitute a violation, thereby precluding enforcement by EPA and citizens pursuant to sections 7413 and 7604. *Id.* at 33,929/1-2. Such provisions undermine the CAA's enforcement structure, which expressly provides for EPA and citizens to bring enforcement actions even if a state agency declines to do so. *Id.*

EPA SIP-called impermissible "enforcement discretion" type provisions in Tennessee's SIP for these reasons. 80 Fed. Reg. at 33,965/1. EPA declined to issue a SIP call for enforcement discretion provisions in six jurisdictions because EPA concluded the provisions at issue did not preclude enforcement by EPA or citizens. *See, e.g.*, 80 Fed. Reg. at 33,969/1-2 (Iowa), 33,970/1 (Nebraska), 33,973/2 (Idaho).

4. Affirmative Defense Provisions

EPA included in the SIP Call provisions in 17 States that create affirmative defenses for violations of applicable emission limitations. 80 Fed. Reg. at 33,957-74 (State-by-State analysis of specific provisions with explanation of substantial inadequacies); *see also* 79 Fed. Reg. at 55,935-54 (analysis in Supplemental Rule). EPA determined that affirmative defense-type SIP provisions that operate to alter or

eliminate the courts' jurisdiction to determine liability or to impose all statutory remedies for violations of SIP requirements would undermine Congress's grant of jurisdiction, and are inconsistent with CAA requirements. 80 Fed. Reg. at 33,851/3-53/1. These provisions also eliminate incentives to comply with emission limitations at all times and properly design, maintain and operate sources. *Id.* at 33,852/3; Legal Mem. at 22-24 (JA429-31).

5. Prospective Recommendations and Guidance

Provided they comply with the Act's requirements, States retain discretion in responding to the SIP Call. 80 Fed. Reg. at 33,878/3-79/3. For example, States may remove legally-deficient provisions and address violations during SSM events on a case-by-case basis through enforcement discretion. Or States may elect to revise emission limitations to include alternative numerical limits, technological controls or work practices for specific modes of operation. Alternatively, States may elect to overhaul the applicable emission limitations. EPA issued comprehensive recommendations and guidance in this regard. *See id.* at 33,974/2-82/2.

6. EPA's Section 7410(k)(5) Substantial Inadequacy Findings

EPA concluded that 36 States have specific SIP provisions that fail to comply with CAA requirements. 80 Fed. Reg. at 33,847/3. EPA directed each affected State to rectify the deficient SIP provisions after finding these failures meet the statutory criteria for substantial inadequacy. 42 U.S.C. § 7410(k)(5); 80 Fed. Reg. at 33,957/2-74/2.

EPA recognized that in different contexts, involving different SIP provisions or bases in section 7410(k)(5) for substantial inadequacy findings, different factors may be appropriate for consideration. 80 Fed. Reg. at 33,938/3, 33,932/2. EPA's findings for the SIP Call are based upon the grounds in section 7410(k)(5) regarding the failure to "otherwise comply with any requirement of [the Act]." In this context, for the legally deficient SIP provisions at issue, EPA construed section 7410(k)(5) to focus on whether the inadequacies are substantial, by considering whether they fail to comply with fundamental CAA requirements applicable to those provisions. *Id.* at 33,925/3-27/1.

EPA determined that SIP provisions establishing automatic exemptions, director's discretion, overbroad enforcement discretion, and affirmative defense provisions fail to comply with fundamental CAA

requirements. *Id.* at 33,927/1-29/3. These provisions also undermine the "fundamental integrity of the CAA's SIP process and structure" that section 7410(k)(5) is designed to protect, because this purpose "[is] undermined if emission limitations relied upon to meet CAA requirements related to protection of public health and the environment can be violated without potential recourse." *Id.* at 33,926/3.

EPA rejected comments that it must make specific factual findings linking a State's deficient SIP provisions to specific adverse air quality impacts or NAAQS violations in that State. EPA explained that neither section 7410(k)(5) nor the other applicable CAA provision requires such fact-specific findings. 80 Fed. Reg. at 33,926/2; 33,931/3-37/1. EPA concluded that it need not wait to issue a SIP call until documenting that each legally-deficient SIP provision results in adverse health impacts, impairs NAAQS attainment or maintenance, interferes with appropriate enforcement or precludes courts from imposing appropriate remedies. *Id.* Because EPA's role is to ensure that SIPs satisfy CAA requirements, and States retain discretion in how they respond to the SIP Call, EPA rejected comments that its SIP Call violated principles of

cooperative federalism, 80 Fed. Reg. at 33,877-79, 33,937 & 33,946/2-47/1.

SUMMARY OF THE ARGUMENT

These petitions implicate several bedrock principles of the CAA. First, emission limitations in SIPs must be continuous and not intermittent. Second, States cannot revise EPA-approved emission limitations without complying with the Act's procedural and substantive requirements for SIP revisions. Third, those emission limitations must be enforceable, including by EPA, States, and citizens, at all times during a source's operation, consistent with CAA requirements. Fourth, if an enforcement action is brought, the district courts have jurisdiction to determine whether an emission limitation has been violated, and if so, to fashion an appropriate remedy under sections 7413(b) and (e).

EPA issued the SIP Call for specific SIP provisions that violate one or more of these bedrock principles. There are four types of deficient SIP provisions at issue: "automatic exemption;" "director's discretion;" overbroad "enforcement discretion;" and "affirmative defense" provisions. The SIP-called automatic exemption provisions exempt emissions during SSM events, rendering otherwise applicable emission limitations discontinuous and unenforceable.

The SIP-called director's discretion provisions impermissibly allow state personnel to modify the EPA-approved emission limitations in their SIPs without complying with the procedural and substantive CAA requirements governing SIP revisions. Most of the SIP-called director's discretion provisions also provide full exemptions at the unilateral discretion of a state official. Automatic and discretionary exemptions, as well as overbroad enforcement discretion provisions, can result in excess emissions that would otherwise be a violation of an emission limitation to be deemed *not* to be a violation. This precludes EPA or citizens from pursuing enforcement.

Petitioners offer competing interpretations of sections 7602(k) and 7410 to challenge EPA's interpretation that SIP provisions cannot include exemptions. Petitioners fail, however, to demonstrate that the CAA compels their interpretations or that EPA's interpretation, which is consistent with this Court's *Sierra Club* decision, is unreasonable. With respect to director's discretion provisions, EPA reasonably concluded that each SIP-called provision violates one or more fundamental CAA requirements, and Petitioners' arguments to the contrary lack merit.

Affirmative defense SIP provisions establish conditions that, if satisfied, impair the jurisdiction of federal courts to determine liability and fashion an appropriate remedy for CAA violations. With respect to the permissibility of affirmative defense provisions, the SIP Call implements EPA's new interpretation of the CAA. EPA had previously interpreted the Act to allow affirmative defense provisions to penalties in limited circumstances, which EPA relied upon in approving an affirmative defense in the Texas SIP at issue in *Luminant*. The Fifth Circuit upheld that action, finding EPA's interpretation permissible under *Chevron* step two. 714 F.3d at 852-53, 859. Thereafter, EPA's interpretation was successfully challenged in *NRDC* in the context of federal hazardous air pollutant regulations. 749 F.3d at 1063-64. EPA consequently reconsidered its interpretation as it applied to other CAA programs, and reasonably determined that affirmative defenses are not permissible in SIP provisions. The *Luminant* decision does not have a preclusive effect in this case because *Luminant* did not address whether EPA's current interpretation is also permissible.

EPA has authority to issue a SIP call for the legally-deficient SIP provisions at issue here. "Whenever" EPA finds that a SIP is

"substantially inadequate" to "attain or maintain the relevant [NAAQS], to mitigate adequately [certain] interstate pollutant transport … *or to otherwise comply with any requirement of this chapter*," the Administrator "shall" require the State to "revise the [SIP] as necessary to correct such inadequacies." 42 U.S.C. § 7410(k)(5) (emphasis added). Under this third ground, EPA appropriately determined that each of the SIP-called provisions was substantially inadequate to comply with requirements of the Act. In this context, EPA construed "substantially inadequate" to include whether the SIP provision "meets the fundamental CAA requirements applicable to such a provision." 80 Fed. Reg. at 33,926/2. EPA explained that each SIP-called provision violated one or more of the bedrock principles discussed above. EPA explained that these CAA requirements are fundamental because they assure that the Act's mandated structure and objectives for SIPs are met, including the Act's enforcement structure. These requirements would be undermined if emission limitations relied upon to meet CAA requirements related to protection of public health and the environment could be violated without potential recourse.

EPA properly rejected Petitioners' arguments that section 7410(k)(5) requires that EPA make State- and fact-specific determinations demonstrating specific adverse effects from a deficient SIP provision before issuing a SIP call. The findings of substantial inadequacy at issue require no such demonstration. Here, States have legally-deficient SIP provisions that fail "to otherwise comply with any requirement" of the Act. EPA reasonably concluded that in this context its findings may be based on the explicit legal requirements of the CAA. *See US Magnesium,* 690 F.3d at 1160. The cooperative structure of the CAA is maintained. The SIP Call in no way compels States to impose any specific SIP control measure on any specific source and leaves States to determine how to rectify the deficient SIP provisions. Industry Petitioners' claim that EPA must consider "costs and benefits" as part of its SIP Call findings is barred, and in any event lacks merit.

STANDARD OF REVIEW

EPA's SIP Call can be overturned only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or in excess of EPA's "statutory jurisdiction, authority, or limitations." 42 U.S.C. § 7607(d)(9)(A), (C). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In interpreting statutory terms, the Court applies the familiar analysis of *Chevron v. NRDC*, 467 U.S. 837 (1984). The Court applies the language of the statute where it reflects "the unambiguously expressed intent of Congress," but where the statute is "silent or ambiguous with respect to the specific issue," the Court must defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." 467 U.S. at 842-43. An administrative agency's power to administer a Congressionally-created program "'necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Long Island*

Care at Home, Ltd. v. Coke, 551 U.S. 158, 165 (2007) (quoting *Chevron*, 467 U.S. at 843). Furthermore, under *Chevron*, the Court "presume[s] that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity." *Natural Res. Def. Council v. EPA*, 777 F.3d 456, 463 (D.C. Cir. 2014).

ARGUMENT

We address Petitioners' arguments in three sections: I) EPA reasonably concluded that the SIP-called automatic exemption, director's discretion and overbroad enforcement discretion provisions are inconsistent with CAA requirements; II) EPA reasonably interprets the CAA to prohibit affirmative defense type provisions that impede the jurisdiction of federal courts, and this interpretation is not precluded by the Fifth Circuit's decision in *Luminant Generation*; and III) EPA reasonably interpreted its authority to issue SIP calls, and its conclusion that "substantial inadequacies" existed to justify the SIP Call was neither arbitrary nor capricious. EPA's interpretations of the Act are reasonable and entitled to deference, and Petitioners fail to meet their burden of proving that EPA acted arbitrarily or capriciously.

I. EPA REASONABLY INCLUDED IN THE SIP CALL PROVISIONS THAT CREATE EXEMPTIONS FROM EMISSION LIMITATIONS OR VIOLATE THE REQUIREMENTS FOR SIP REVISIONS.

Petitioners' arguments challenging EPA's SIP Call for automatic exemption and director's discretion provisions lack merit for the following reasons: 1) EPA reasonably interprets the CAA to require that SIP emission limitations be "continuous," thus precluding exemptions

for excess emissions; 2) director's discretion provisions are inconsistent both with the "continuous" requirement and also the Act's requirements for revising SIPs; and 3) other SIP provisions relied upon by Petitioners do not exonerate the exemptions or unbounded director's discretion in the SIP-called provisions.

A. The SIP-Called Automatic Exemption Provisions Violate the Act's Requirement that Emission Limitations Be Continuous and Enforceable.

EPA SIP-called automatic exemption provisions because they undermine the CAA requirement that emission limitations be continuous and enforceable. *See* 80 Fed. Reg. at 33,927/1-3. Since at least 1982, EPA has interpreted the Act to prohibit such exemptions. Notwithstanding this longstanding interpretation, EPA found SIP provisions in 15 States that automatically exempt sources from compliance with emission limitations during startup, shutdown, malfunction or other periods. These exemptions are inconsistent with fundamental statutory requirements for SIP provisions.

EPA's interpretation—that emission limitations must apply continuously and without exemptions—is grounded in CAA sections and 7410(a)(2)(A) and 7602(k). As explained above, under section

7410(a)(2)(A), each SIP must contain enforceable emission limitations as necessary to meet *all* applicable CAA requirements. *See also* 42 U.S.C. §§ 7410(k)(3), 7410(*l*) (requiring SIP submissions and revisions to meet all applicable CAA requirements); 80 Fed. Reg. at 33,902/2. These requirements include, *inter alia*, attaining and maintaining the NAAQS, protection of PSD increments, and protection of visibility in Class I areas.

The "emission limitations" that SIPs must include were defined by Congress as

> a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a *continuous* basis, including any requirement relating to the operation or maintenance of a source to assure *continuous emission reduction*, and any design, equipment, work practice or operational standard promulgated under this chapter.

42 U.S.C. § 7602(k) (emphases added); *Sierra Club*, 551 F.3d at 1027. The plain meaning of the term "continuous," its statutory context, and the legislative history all support EPA's interpretation. Where a term is not statutorily defined, as is the case with "continuous," the courts "construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The plain meaning

of "continuous" is "uninterrupted." *Webster's Third New International Dictionary* 493-94 (Phillip Babcock Gove ed., Merriam-Webster 2002); 80 Fed. Reg. at 33,901/1 & n.207. This meaning is especially appropriate given the statutory context: section 7410(a)(2)(A) requires that SIPs include "emission limitations," as defined in section 7602(k). Legislative history demonstrates that emission limitations "[must] be complied with at all times" in order to (among other things) protect the NAAQS. 80 Fed. Reg. at 33,901/3 (quoting H.R. Rep. No. 95-294 at 92 (1977), reprinted in 1977 U.S.C.C.C.A.N. 1077, 1170). Congress unambiguously required that emission limitations in SIPs provide continuous control of a source's emissions, during all modes of operation.

Even if section 7602(k)'s "continuous" requirement was ambiguous, EPA's interpretation is reasonable. The legislative history itself provides one reason: "'Without an enforceable emission limitation which will be complied with at all times, there can be no assurance that ambient standards will be attained and maintained'." 80 Fed. Reg. at 33,901/3 (quoting H.R. Rep. No. 95-294 at 92). As EPA explained, 80 Fed. Reg. at 33,901/1-2, even a "brief" exemption from an emission

limitation negates its continuity and thus is inconsistent with the statutory requirement to limit emissions "on a continuous basis." *See Sierra Club*, 551 F.3d at 1027. Exemptions also result in substantive CAA requirements not applying during the exempt period of operations (e.g., SSM events), such as the requirement in nonattainment areas that emission limitations reflect the level of reductions that constitute "reasonably available control technology." 80 Fed. Reg. at 33,893/3.

Accordingly, EPA reasonably interprets sections 7410(a)(2)(A) and 7602(k) to prohibit exemptions for excess emissions during SSM events in SIP provisions. *Id.* at 33,893. By exempting sources from compliance with any emission limitations during SSM events, the SIP-called automatic exemption provisions render emission limitations in the SIPs discontinuous.

EPA's interpretation is supported by and consistent with this Court's decision in *Sierra Club*. That case concerned SSM provisions applicable to some of EPA's standards for hazardous air pollutants under section 7412. Those provisions provided that the relevant emission standards did not apply during SSM events, but required sources to comply at all times with the "general duty" to maintain and

operate the affected facility, including its pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions. 551 F.3d at 1022. The Court read sections 7412 and 7602(k) together and held that "Congress has required that there must be continuous section 112-compliant standards." *Id.* at 1027. The Court also found that the "general duty" provision at issue was not a section 7412-compliant standard. *Id.* at 1027-28.

The Court thus concluded that the SSM exemption in EPA's section 7412 regulations "violates the CAA's requirement that some section 112 standard apply continuously." *Id.* at 1028. EPA agrees with this Court's reasoning, which applies equally in the context of emission limitations required in SIPs. 80 Fed. Reg. at 33,893/2-3. The definition of "emission limitation" applicable to section 7412 regulations indisputably also applies to SIP provisions governed by section 7410. *See* 42 U.S.C. § 7602(k) ("a requirement established by the State *or* the Administrator..."); *see also id.* § 7602 (definitions apply "[w]hen used in this chapter"). Reading sections 7410 and 7602(k) together leads to the same outcome the Court reached in reading sections 7412 and 7602(k)

together: emission limitations must apply *continuously*, without interruption. 80 Fed. Reg. at 33,894.[10]

Other circuits have affirmed EPA's interpretation. In *Michigan Department of Environmental Quality v. Browner*, the Sixth Circuit affirmed EPA's disapproval of a SIP submission that included an automatic exemption for excess emissions during SSM events. 230 F.3d 181, 186 (6th Cir. 2000). The court considered EPA's statutory interpretation dating back to 1977, and particularly in the 1982 and 1983 Guidance, that all excess emissions during SSM events must be considered violations. *Id.* at 183-84. The court held that EPA's interpretation applied to the provision at issue was reasonable, and affirmed EPA's disapproval of the submitted provision as inconsistent with the requirements of the Act. *Id.* at 185-86.[11]

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[10] EPA does not, however, interpret section 7602(k) as requiring that *the same* numerical limit apply at all times. 80 Fed. Reg. at 33,889/3, 33,900; *see Sierra Club*, 551 F.3d at 1027 (section 7602(k) "suggests that emissions reduction requirements 'assure continuous emission reduction' without necessarily continuously applying a single standard."); 80 Fed. Reg. at 33,894/1-2 (discussing *Kamp v. Hernandez*, 752 F.2d 1444, 1452 (9th Cir. 1985), which affirmed this interpretation).

[11] The court also held that EPA reasonably concluded that the SIP provision's automatic exemption could adversely impact ambient air

Footnote continued...

Similarly, the Tenth Circuit affirmed a federal implementation plan that treated excess emissions resulting from malfunctions as violations. *Arizona Public Serv. Co. v. EPA*, 562 F.3d 1116, 1129 (10th Cir. 2009). The court held that the federal implementation plan was consistent with EPA's longstanding interpretation of the Act as expressed in EPA's various guidance documents, and that EPA's SSM Policy "is a reasonable interpretation of the [CAA]." *Id.*

Most recently, the Ninth Circuit considered challenges to EPA's disapproval of a submitted provision that would have exempted a source's emissions during SSM events. *Montana Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174 (9th Cir. 2012). The court considered EPA's 1983 and 1999 Guidance, *id.* at 1191, and noted that the Sixth, Tenth and D.C. Circuits had "endorsed the EPA's position that the [CAA] requires continuous compliance, including during SSM." *Id.* at 1192 (citing *Browner*, *Ariz. Public Serv. Co.* and *Sierra Club*). The Ninth Circuit adopted the position of its sister circuits, holding that "EPA reasonably

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quality, and thus the attainment and maintenance of the applicable NAAQS. *Id.* at 185.

interpreted the [CAA] to require continuous limits on emissions," including during SSM events. *Id.* at 1193, 1197.

Industry Petitioners' arguments as to why EPA's interpretation of the CAA as prohibiting exemptions for excess emissions in SIP provisions is incorrect boil down to three key points: 1) *Sierra Club* does not support EPA's interpretation as applied to SIPs; 2) EPA misinterprets section 7602(k); and 3) EPA misinterprets section 7410(a)(2)(A). Notably, Industry Petitioners do not dispute that the SIP provisions at issue create exemptions; rather they argue that exemptions are permissible or that general duty provisions provide continuous control, thereby supposedly curing exemptions in other provisions. Each argument lacks merit and should be rejected.

The Sierra Club Decision. Industry Petitioners construe *Sierra Club* as applying only to section 7412. Ind. Br. 47-49. This narrow reading is incorrect. While *Sierra Club* considered regulations under section 7412, the relevant aspect of the Court's holding—that the CAA requires any "emission limitation" to ensure "continuous" emission reduction—did not turn on any *sui generis* element of section 7412. *See* 80 Fed. Reg. at 33,894. Although Industry Petitioners downplay the role

of section 7602(k) in the decision, the requirement that the section 7412 standards be continuous was based solely on the definition of "emission limitation," and the Court considered both the plain language and the legislative history of section 7602(k). 551 F.3d at 1027.

Industry Petitioners also incorrectly assert that the discretion afforded to States under section 7410 changes this analysis.[12] To the contrary, reading sections 7410 and 7602(k) together leads to precisely the same outcome the Court reached in reading sections 7412 and 7602(k) together: emission limitations must apply *continuously*, without interruption. 80 Fed. Reg. at 33,894. As EPA explained:

> Although the precise components of an emission limitation or standard may expand depending on which other provisions of the CAA are applicable, the bedrock definition for what it means to be an "emission limitation" under section 302(k) does not.

Id. at 33,901/2. Just as there is a stringency requirement imposed by section 7412, SIP emission limitations must meet a host of specific statutory stringency levels, *e.g.*, reasonably available control technology, best available control technology, best available retrofit

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[12] *See infra* at 48-51 (discussing section 7410(a)(2)(A)); *see also* 80 Fed. Reg. at 33,901 n.211 (incorporation of cooperative federalism in section 7410 does not *ipso facto* mean "emission limitation" has a different definition in that context).

technology, and lowest achievable emission rate. *See* 80 Fed. Reg. at 33,893/3-94/1; *see also infra* at 70-73. Thus, even if some requirements differ between sections 7410 and 7412, the interpretation of section 7602(k) in *Sierra Club* applies in precisely the same manner.

Finally, while Industry Petitioners are correct (Ind. Br. 48-49) that the *Sierra Club* court rejected EPA's argument that a general duty provision provided "continuous" control because the general duty provision was not a section 7412-compliant standard, 551 F.3d at 1027-28, Industry Petitioners fail to account for the Court's underlying holding that exempting sources from complying with the section 7412 standards during SSM events "violates the CAA's requirement that some section 112 standard apply *continuously*" in light of section 7602(k). *Id.* at 1028 (emphasis added). *See also infra* at 70-73 (discussing *Sierra Club* and general duty provisions).

Interpretation of Section 7602(k). Notwithstanding this Court's decision in *Sierra Club* that the plain language of section 7602(k) requires emission limitations to apply continuously, Industry Petitioners argue that the statute merely requires that emission limitations must provide for "continuous," as opposed to intermittent,

reduction of emissions, and that an emission limitation can be "continuous" even if it does not apply to certain modes of operation (e.g., SSM events). Ind. Br. 41-42. This Court has already rejected the latter argument in *Sierra Club*, holding at *Chevron* step one that "continuous" requires control at all times, including during SSM events. *Sierra Club*, 551 F.3d at 1027-28. Even if *Sierra Club* were distinguishable, and even if Industry Petitioners' interpretation were plausible, that interpretation is not *required*. Even if ambiguous, EPA reasonably interprets sections 7410(a)(2)(A) and 7602(k) to require that SIP emission limitations must apply at all times a source is operating, and that exemptions for SSM events in SIP emission limitations are inconsistent with statutory requirements.[13] This permissible interpretation deserves *Chevron* deference.

Industry Petitioners attempt to bolster their plain language argument by contending that EPA has previously used "continuous" in a manner consistent with their interpretation in a 1982 guidance document and the Credible Evidence Rule. Ind. Br. 42-43. This

[13] Moreover, EPA considered and reasonably rejected Industry Petitioners' interpretation of sections 7410(a)(2)(A) and 7602(k). 80 Fed. Reg. at 33,896/1-98/1.

argument is irrelevant because those statements pre-date EPA's current interpretation, articulated in the 2015 SSM Guidance and applied in the SIP Call. Moreover, in EPA's past guidance documents relevant to SIPs, EPA consistently stated that SIP provisions cannot include exemptions for SSM events. *See supra* Statutory Background I(F). Regarding the Credible Evidence Rule, EPA explained, 80 Fed. Reg. at 33,907/1-08/1, that after the *Sierra Club* decision "interpreting the definition of emission limitation in section 302(k), these EPA statements in the preamble for the Credible Evidence Rule are no longer correct and thus do not apply to the [SSM Action]." *Id.* at 33,907/3.

Next, Industry Petitioners also rely on legislative history to try to bolster their interpretation (Ind. Br. 43-47), including the same passage ("the committee has made clear that constant or continuous means of reducing emissions must be used to meet these requirements") quoted by this Court in *Sierra Club*. *Compare* Ind. Br. 46 *with Sierra Club*, 551 F.3d at 1027. But even if Industry Petitioners' reading of this legislative history undermined this Court's determination of section 7602(k)'s plain meaning, it fails to demonstrate that EPA's interpretation is

unreasonable and not entitled to deference. There is no question that Congress intended the definition of "emission limitation" to apply to "*all* emission limitations or standards under the act, not just to limitations under sections 110, 111 or 112 of the act." H.R. Rep. No. 95-294 at 92; *see also* 80 Fed. Reg. at 33,901/2. Contrary to Petitioners' assertions, Congress intended to do more than merely address concerns with weather-dependent intermittent controls or dispersion techniques. *See* 80 Fed. Reg. at 33,901/2-3. Finally, as the House Report explained:

> Each source's prescribed emission limitation is the fundamental tool for assuring that ambient standards are attained and maintained. Without an enforceable emission limitation which will be *complied with at all times*, there can be no assurance that ambient standards will be attained and maintained.

H.R. Rep. No. 95-294 at 92 (emphasis added); *see also* 80 Fed. Reg. at 33,901/3-02/1 (discussing additional legislative history).

Interpretation of Section 7410(a)(2)(A). Finally, Industry Petitioners contend (Ind. Br. 50-52) that EPA is trampling the States' discretion under section 7410(a)(2)(A) to determine what "enforceable emission limitations and other control measures, means, or techniques … [are] necessary or appropriate" to meet CAA requirements. It is indisputably a "requirement[] of this chapter" that SIPs include

"enforceable emission limitations," and EPA reasonably interprets section 7602(k) to require that those emission limitations apply at all times during a source's operations. 80 Fed. Reg. at 33,902/2. Any discretion conferred upon the States by section 7410(a)(2)(A) does not change section 7602(k)'s critical "continuous" requirement. Industry Petitioners' attempt to rely on principles of cooperative federalism (Ind. Br. 51) to prove EPA's interpretation is unreasonable is unavailing. *See* 80 Fed. Reg. at 33,876/3-79/3 (response to comments regarding principles of cooperative federalism); Legal Mem. at 1-3 (JA408-10).

EPA is not attempting to impose its preferences upon the States, but rather is carrying out its responsibility to ensure that SIPs comply with CAA requirements.[14] *See Michigan v. EPA*, 213 F.3d 663, 687 (D.C. Cir. 2000) (while States have "considerable latitude in fashioning SIPs, the CAA 'nonetheless subject[s] the States to strict minimum compliance requirements' and gives EPA the authority to determine a state's compliance with the requirements") (quoting *Union Elec. Co. v.*

[14] EPA cannot "legally or functionally require a State to adopt a specific control measure in its SIP in response to a SIP call." 80 Fed. Reg. at 33,878/3. Here, the States may correct inappropriate provisions as they see fit. *Id.* at 33,879/1.

EPA, 427 U.S. 246, 256-57 (1976)); *Browner*, 230 F.3d at 183 ("Although the states are given broad authority to design programs, the EPA has the final authority to determine whether a SIP meets the requirements of the CAA"); *see also* 80 Fed. Reg. at 33,902/2-03/1.

Further, States *do* have the discretion *not* to regulate a source or source category entirely if doing so is not necessary or appropriate to meet CAA requirements. Once a State chooses to regulate a source, however, then any emission limitations imposed in a SIP must apply continuously. *See, e.g.*, 80 Fed. Reg. at 33,902/3; *supra* at 20 (discussing EPA's denial of the petition for SIP provisions in South Carolina and D.C. because the sources at issue were not regulated by the SIP provision).

Industry Petitioners overstate the impact of the SIP Call on state discretion. Through the SIP Call, EPA directed certain States to revise deficient SIP provisions to meet the requirements of the Act, but EPA has not mandated a particular means for doing so. Rather, EPA provided comprehensive guidance concerning the range of choices available to States. Ultimately, the decision how to proceed is up to each State, so long as the revised SIP provisions meet CAA

requirements applicable to such SIP provisions. 80 Fed. Reg. at 33,879/2-3; 33,937/1-3.[15] *See also id.* at 33,896/1-97/2 (rejecting argument that by labeling SIP provisions with exemptions for SSM events as "control measures, means, or techniques," States can avoid the statutory requirement to provide continuous emission controls).

B. The SIP-Called Director's Discretion and Overbroad Enforcement Discretion Provisions Are Inconsistent with CAA Requirements.

The director's discretion SIP provisions at issue present the same problems and inconsistencies with CAA requirements as those that create automatic exemptions, including rendering otherwise applicable emission limitations less-than-continuous and precluding EPA and citizens from bringing enforcement actions by deeming excess emissions not to be violations. The difference is that director's discretion provisions confer upon state personnel the *discretionary* authority to change SIP requirements unilaterally, up to and including the authority to grant exemptions from emission limitations for excess emissions

[15] Industry Petitioners' argument (Ind. Br. 51) that EPA is interfering with States' development of "achievable" emission limitations lacks merit. As EPA explained, States can develop emission limitations or alternative emission limitations specifically for certain modes of source operation, such as startup and shutdown, which are "achievable" and also satisfy CAA requirements. 80 Fed. Reg. at 33,898/1-99/2.

during SSM events. As discussed in detail below, these provisions allow state officials to modify existing SIP requirements without complying with the substantive and procedural requirements to revise SIPs. 80 Fed. Reg. at 33,927/3. Similarly, overbroad enforcement discretion provisions authorize state officials to make unilateral decisions that preclude enforcement by EPA or citizens.

1. The SIP-Called Director's Discretion Provisions Allow States to Impermissibly Revise their SIPs.

A critical defect of the SIP-called director's discretion provisions is that they allow state personnel unilaterally to revise SIP provisions by changing approved emission limitations without complying with the Act's mandated SIP revision process. *See* 42 U.S.C. §§ 7410(a)(1) & (2), (i), (k), (*l*); 7515; 80 Fed. Reg. at 33,928/1-2 & n.298.[16] "Once approved by EPA, a SIP becomes federal law … and cannot be changed unless and until EPA approves any change." *Comm. for Better Arvin v. EPA*, 786 F.3d 1169, 1174 (9th Cir. 2015) (quotation omitted). Any emission limitations approved into the SIP can only be changed "through a SIP

[16] Further, revisions to approved emission limitations must comply with any other substantive requirements, such as particular stringency requirements (e.g., reasonably available control technology-level control measures) or requirements necessary for enforcement.

revision approved by EPA in another notice-and-comment rulemaking. *See* 42 U.S.C. § 7410(l)." *Id.*

State Petitioners retort that the exercise of director's discretion does not revise the SIP but "merely applies" the discretionary authority EPA previously approved into the SIP. State Br. 30. This just proves the point. *See* 80 Fed. Reg. at 33,919/2-20/1. EPA found that none of the SIP-called provisions "provides sufficient process or sufficient bounds on the exercise of director's discretion to be permissible." 80 Fed. Reg. at 33,928/3. Indeed, EPA explained that most of the provisions "on their face would allow potentially limitless exemptions from SIP requirements with potentially dramatic adverse impacts inconsistent with the objectives of the CAA." *Id.* at 33,928/3.

For example, EPA SIP-called provisions in Delaware's SIP that grant state officials "unbounded" discretion to change EPA-approved emission limitations by imposing different limits—or potentially no limit whatsoever—in operating permits. 78 Fed. Reg. at 12,495/2; 80 Fed. Reg. at 33,960/2; RTC at 8-9 (JA1120-21); *see also* 7 Del. Admin. Code 1104, § 1.5 (EPA-approved SIP emission limitations "shall not apply" when startup and shutdown emissions are governed by State-

issued operating permits). By incorrectly challenging EPA's SIP Call of the Delaware provision as an automatic exemption (State Br. 27), State Petitioners have waived any challenge to EPA's actual grounds for the SIP Call, *i.e.*, that the Delaware provision is an impermissible director's discretion provision.

State Petitioners also challenge (State Br. 29) EPA's determination that Kentucky's SIP includes an unbounded director's discretion provision on the grounds that it includes non-numerical limitations. First, State Petitioners do not dispute that the SIP-called provision authorizes Kentucky personnel, in their unilateral discretion, to exempt excess emissions during shutdown or malfunctions and deem such emissions *not* to be a violation. State Br. 29 (quoting 401 Ky. Admin. Reg. 50:055 § 1(1)). Second, State Petitioners are incorrect that the generic requirements in § 1(4)—such as to minimize *excess* emissions and properly maintain and operate the source—are CAA-compliant "alternative emission standards" or "non-numerical limitations" that substitute for an enforceable continuous emission limitation. *See infra* at 76-80, 82-83 (discussing similar preconditions to exemptions and general duty provisions). Third, if the state director in

her unilateral discretion determines that a source does not comply with these generic requirements, the source does not qualify for a discretionary exemption and the excess emissions will be in violation of the emission limitation, *not* the requirements State Petitioners offer as substitutes.

Ultimately, the Kentucky provision leaves it entirely to state personnel to determine whether excess emissions during an SSM event constitute a violation of the emission limitation, and thus is not sufficiently bounded. If state personnel unilaterally grant a discretionary exemption, then EPA and citizens cannot pursue enforcement actions for violation of the emission limitation because no violation will be deemed to have occurred. 79 Fed. Reg. at 12,506/1-07/1; 80 Fed. Reg. at 33,957/3-58/1, 33,963/2.[17]

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[17] State Petitioners also cite (State Br. 29) West Virginia's comment letter as evidence of a "similar error" by EPA in calling West Virginia SIP provisions, but fail to provide any argument or explanation. EPA fully explained the basis for calling several West Virginia SIP provisions in the proposed (78 Fed. Reg. at 12,499/1-501/2) and final rules (80 Fed. Reg. at 33,961/2-62/2), including that state officials have unilateral authority to decide what constitute "malfunctions," which are exempted from compliance with applicable emission limitations. *See also* RTC at 23-24 (JA1135-36). Any general duty or similar provisions in the West Virginia SIP, as with Kentucky, do not make the SIP-called

Footnote continued...

In contrast to the SIP-called provisions, an appropriate director's discretion provision might meet CAA requirements if it is "sufficiently specific, provide[s[for sufficient public process and [is] sufficiently bounded," such that when EPA initially evaluates the provision for approvability, EPA can consider how the State will apply the provision and understand the potential consequences from the exercise of discretion.[18] 80 Fed. Reg. at 33,927/3. Under this approach, EPA can verify that any exercise of discretion within the specified range will be consistent with all applicable CAA requirements.

To illustrate, consider a hypothetical, properly-bounded SIP provision that allows Source X to emit 100 tons of a pollutant per day. If conditions A and B and public process requirements are satisfied, the air director has the discretion to authorize Source X to emit 110 tons on a particular day. The outer bound of 110 tons enables the State to

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provisions sufficiently bounded, and do not prove (especially in the absence of any articulated argument) that the SIP Call for West Virginia was arbitrary or capricious.

[18] Alternatively, a director's discretion provision could be consistent with CAA requirements if the exercise of discretion has no effect for purposes of federal law unless EPA approves a SIP revision incorporating that action into the SIP. 80 Fed. Reg. at 33,918/1.

analyze, and EPA to consider when it reviews that provision, whether that exercise of director's discretion will interfere with any applicable CAA requirements and whether it meets applicable stringency requirements. Now suppose the SIP provision allows unbounded discretion. If the director allows Source X to emit 1,000 tons per day (or allows an exemption and thus unlimited tons), whether on a recurring *ad hoc* basis or on a permanent basis, Source X may now "legally" emit ten times as much as what the federally-codified SIP[19] would allow. But that federally-codified SIP is what EPA approved as meeting CAA requirements.[20]

To revise the SIP provision to change the emission limitation from 100 to 1,000 tons per day consistent with the Act, the State would have been required to provide notice and a public hearing pursuant to

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[19] EPA-approved SIPs are codified in Part 52 of the Code of Federal Regulations. If the emission limitation has been changed outside of the SIP revision process, citizens may not be able to ascertain what the applicable emission limitation truly is. *See infra* at 73-75.

[20] If Source X is a stationary source, this discretionary change of the emission limit violates section 7410(i). State Petitioners' theory, if accepted, would allow States to write section 7410(i) out of the Act by adopting a generic provision giving the state director discretion to change any SIP requirement for any stationary source.

sections 7410(a)(1), (2) and 7410(*l*). The public would have the opportunity to comment on the proposed revision. 42 U.S.C. § 7410(k). EPA would evaluate the revision pursuant to the requirements of sections 7410(k), 7410(*l*), 7515, and any other CAA requirements applicable to the specific SIP provision at issue (such as stringency levels). Critically, the State would be required to demonstrate that the SIP revision allowing 1,000 tons per day would not interfere with attainment or maintenance of the NAAQS, PSD increments, protecting visibility, or any other applicable CAA requirement. 80 Fed. Reg. at 33,928/1. As EPA explained:

> Congress presumably imposed these many explicit requirements in order to assure that there is adequate public process at both the air agency and federal level for any SIP revision and to assure that any SIP revision meets the applicable substantive requirements of the CAA.

80 Fed. Reg. at 33,928/2. None of the SIP-called director's discretion provisions require the States to comply with these procedural and substantive requirements for a SIP revision, and as a result, there is no opportunity for EPA to evaluate whether the changes to the emission limitations interfere with meeting the applicable requirements of the Act.

State Petitioners also rely on a nonsensical analogy to attempt to show that EPA's position "defies common sense." State Br. 30. The State Petitioners correctly observe that EPA must promulgate new source performance standards and regulations for hazardous air pollutants under sections 7411 and 7412, respectively. *Id.* They further correctly observe that under very narrow circumstances, EPA has the authority to promulgate a non-numerical emission limitation in such regulations. *Id.* (citing 42 U.S.C. §§ 7411(h)(1), 7412(h)(1)).

State Petitioners, however, fail to recognize fundamental differences between EPA's authority to create these alternative limitations in a notice-and-comment rulemaking and a state air director's *ad hoc* exercise of discretion to revise emission limitations previously approved by EPA. First, State Petitioners' analogy ignores the relative roles of the States and EPA. A State's revisions to its emission limitations are subject to EPA's review and approval. 42 U.S.C. § 7410(k). In contrast, EPA may exercise its statutory authority to promulgate non-numerical standards under sections 7411 and 7412 through notice-and-comment rulemaking. *See id.* § 7607(d). Unbounded director's discretion provisions—allowing States to unilaterally revise

SIP provisions—violate EPA's statutory authority and responsibility in the SIP process. EPA's promulgation of a non-numerical standard under sections 7411 and 7412 presents no such problem.

Second, the Act prescribes substantive requirements for EPA to comply with in promulgating a non-numerical standard under those sections, and EPA's actions are subject to judicial review. The Act also prescribes substantive requirements for a SIP revision. *See, e.g.*, 42 U.S.C. § 7410(*l*). Unbounded director's discretion provisions purport to give state officials permission to violate those requirements, for example, by making an emission limitation discontinuous through granting exemptions applicable to SSM events.

In arguing that the Fifth Circuit "has held that director's discretion provisions comply with the CAA," State Petitioners overstate the holdings in *Texas v. EPA*, 690 F.3d 670 (5th Cir. 2012) and *Luminant Generation Co. v. EPA*, 675 F.3d 917 (5th Cir. 2012). EPA explained why both decisions are distinguishable. 80 Fed. Reg. at 33,920/1-22/2. Both cases involved EPA's disapproval of specific SIP submissions; in neither did the Fifth Circuit issue a sweeping holding or interpret the CAA provisions that EPA explains in the SSM Action are

violated by the SIP-called director's discretion provisions. *See id.* at 33,922/1-2. Critically, both decisions turned on the administrative record in each case, as the Fifth Circuit held EPA had not provided sufficient explanation why the provisions at issue were inconsistent with the Act. *Id.* at 33,920/3-21/3; *see, e.g.*, *Luminant Generation*, 675 F.3d at 924-25, 931. In contrast here, EPA has explained at length why the SIP-called provisions are inconsistent with fundamental CAA requirements. 80 Fed. Reg. at 33,917-23; 33,927-29; 33,957-58; 33,959-74 and 78 Fed. Reg. 12,491-538 (State-by-State analysis).

2. EPA Reasonably Determined that the SIP-Called Provisions Are Inconsistent with CAA Enforcement.

As with automatic exemptions, discretionary exemptions and overbroad enforcement discretion provisions preclude EPA or citizens from pursuing enforcement when state personnel deem excess emissions to not violate applicable emission limitations. 80 Fed. Reg. at 33,929/1-2. Compounding this problem, *ad hoc* excuses from compliance may not be known to the public or EPA, thereby making attempts at enforcement even more difficult. *Id.* State Petitioners argue that EPA's interpretation of SIP-called provisions in Ohio, Tennessee and North

Carolina as precluding enforcement by EPA or citizens is arbitrary or capricious. They are mistaken.

EPA included Ohio Admin. Code 3745-15-06(A)(3) in the SIP Call because that provision could be interpreted to allow a state official to unilaterally determine that otherwise applicable SIP emission limitations do not apply during periods of scheduled maintenance. 78 Fed. Reg. at 12,519/2; 80 Fed. Reg. at 33,966/3-67/2.

State Petitioners argue (Br. 31) that Ohio interprets this provision not to exempt excess emissions or create an enforcement bar, and claim that the "plain language" contradicts EPA's interpretation. Notwithstanding Ohio's assertions,[21] the SIP provision is hardly as clear as Ohio suggests. It explicitly gives Ohio personnel discretion to authorize sources to operate while their emissions control equipment is shut down for maintenance where "in [their] judgment, the situation justifies continued operation of the sources." Ohio Admin. Code 3745-15-06(A)(3). While the source must minimize the shutdown of the

[21] Ohio's reported practice of privately advising sources that "all excess emissions are violations" (State Br. 31) is irrelevant because only the EPA-approved SIP is enforceable as federal law and relevant to whether a violation has occurred.

emissions control equipment, demonstrate that all "feasible" measures will be implemented to "minimize" emissions, and explain why it is "impossible or impractical" to shut down the source, *id.*, the air director has unilateral discretion to determine compliance with those criteria.

The SIP-called provision plainly gives the state official unilateral authority to allow a source to operate with its pollution control equipment off. The provision is at best ambiguous regarding the source's obligation to comply with any applicable emission limitations and the scope of the state official's authority to excuse excess emissions. As EPA explained, to the extent Ohio officials' actions can be read to excuse excess emissions, it could, consequently, impermissibly preclude enforcement by EPA or citizens. 78 Fed. Reg. at 12,519/3; RTC at 70 (JA1182).

In sum, EPA reasonably SIP-called this Ohio SIP provision because it could be read to allow state officials to excuse sources from applicable emission limitations during maintenance. If, as Ohio contends, it interprets this provision to be read narrowly and *not* to excuse compliance with applicable emission limitations, then it should

place minimal burden on Ohio to revise its SIP to make this explicit. *See infra* at 73-75.

State Petitioners also claim (Br. 32) that, in spite of the North Carolina director's discretion provisions, all excess emissions are considered a violation. Through selective quoting, State Petitioners obscure the aspects of these provisions that led to the SIP call. Notably, 15A N.C. Admin. Code 2D.0535(c) states that "[a]ny excess emissions ... are considered a violation ... *unless the owner or operator of the source of excess emissions demonstrates to the Director*, that the excess emissions are the result of a malfunction" (emphasis added). Similarly, 15A N.C. Admin. Code 2D.0535(g) provides that excess emissions during startup and shutdown are a violation only if the source cannot demonstrate to the state director that the excess emissions were unavoidable. EPA reasonably determined these provisions to be substantially inadequate because they allow unilateral discretionary exemptions. 78 Fed. Reg. at 12,510/2; 80 Fed. Reg. at 33,964/1-/2; RTC at 60 (JA1172).

Contrary to State Petitioners' argument (Br. 32), EPA reasonably SIP-called Tennessee provisions that go beyond guiding Tennessee's

enforcement discretion by allowing Tennessee officials to excuse excess emissions, thereby precluding EPA or citizens from pursuing enforcement. 78 Fed. Reg. at 12,512/2-13/2; 80 Fed. Reg. at 33,965/1. The SIP-called overbroad enforcement discretion provisions require an automatic notice of violation "*except* for visible emission levels included as a permit condition under Chapter 1200-3-5-.02(1)." Tenn. Comp. R. & Regs. 1200-03-20-.07(1) (renumbered 1200-03-20-.06) (emphasis added) (Add. 60). State officials have the authority to "excuse or proceed upon" a violation. *Id.* 1200-03-20-.07(1). Moreover, the SIP-called Tennessee director's discretion provision authorizes state officials to excuse excess visible emissions after giving "due allowance" to the fact that they were emitted during startup or shutdown. Tenn. Comp. R. & Regs. 1200-03-05-.02(1).

Nothing in these provisions limits the effect of excusing excess emissions to only the State's enforcement authority. *See* RTC at 64 (JA1176), 78 Fed. Reg. at 12,512/3-13/2. Once excused by the State, a court could reasonably conclude that Tennessee's provisions operate to "preclude the EPA and the public from enforcing against violations that

occur during SSM events if the state official chooses to 'excuse' such violations." *Id.* at 12,513/1.

Ultimately, EPA reasonably concluded that the Ohio, Tennessee and North Carolina provisions undermine the Act's enforcement scheme. Even if State Petitioners' readings of the provisions were reasonable, however, such ambiguity does not demonstrate that EPA exceeded its authority or acted arbitrarily in calling those provisions. *See US Magnesium*, 690 F.3d at 1170; *see infra* Argument III(B)(3).

Finally, State Petitioners argue (Br. 33) that EPA or citizen enforcement is still possible—notwithstanding any exercise of director's discretion to grant exemptions—through general duty provisions, source operating permits, or "direct enforcement of the NAAQS" under SIP provisions. EPA's concerns with the general duty provisions relied upon by Petitioners are discussed *infra* Argument I(C). Operating permits (under CAA Title V) do not add substantive emission limitations but rather reflect what is in the SIP.[22] 40 C.F.R. § 70.6(a)(1). As such, if there is a director's discretion provision in the SIP that

[22] Notably, not every source is required to have a Title V permit, further undermining State Petitioners' argument.

allows exemptions for excess emissions during SSM events, that discretionary authority carries over into the operating permit, precluding the independent enforcement suggested by State Petitioners.[23] *See, e.g.,* 78 Fed. Reg. at 12,504/2-3 (example of carry-over into operating permit).

Notwithstanding any SIP provisions to the contrary, citizens cannot sue under section 7604 to challenge a State's failure to attain a NAAQS. *See Citizens for a Better Environment v. Deukmejian*, 731 F. Supp. 1448, 1454 (9th Cir. 1990). To the extent State Petitioners argue that citizens can seek to enforce a general duty against a specific source to avoid causing a NAAQS violation, as discussed *infra* Argument I(C), that general duty cannot substitute for a valid continuous emission limitation designed to meet specific CAA requirements, such as attaining or maintaining the NAAQS.

State Petitioners' reliance on these various alleged alternative means of enforcement misses the critical point: the SIP-called director's

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[23] Once the States revise their SIPs in response to the SIP Call, the "SIP revisions will ultimately need to be reflected in revised operating permit terms for sources." 80 Fed. Reg. at 33,957/1. This will not happen automatically as a result of the SIP Call. *Id.*

discretion provisions allow state personnel to deem excess emissions not to be violations of applicable emission limitations, thereby rendering those emission limitations less-than-continuous and precluding enforcement for what would be violations absent the discretionary exemptions. Ultimately, these provisions allow sources to violate their emission limitations without consequences.

C. Petitioners' Reliance on General Duty and Similar Provisions Fails to Prove the SIP Call Is Arbitrary or Capricious.

Petitioners claim (Ind. Br. 38-40, State Br. 22-23) that even if EPA is correct that there must be "continuously applicable emission limitations" then so-called "general duty" provisions "apply to all periods of source operations" (Ind. Br. 38) and exonerate the SIP-called provisions that allow impermissible automatic or discretionary exemptions. Petitioners are incorrect.

General duty-type provisions raised in comments or the briefs require sources to, for example, "minimize emissions," "use good engineering judgement at all times," avoid "improperly operating or maintaining facilities," or "not [] cause a violation of the NAAQS at any time." 80 Fed. Reg. at 33,889/3-90/1, 33,903/1. Far from "ignoring"

general duty provisions (State Br. 23), EPA provided a comprehensive response to this argument, *see* 80 Fed. Reg. at 33,903-04, and responded with additional detail in the separate response to comments document where necessary. *See, e.g.*, RTC at 40-42 (Florida) (JA1152-54). EPA also addressed these provisions in its 2015 guidance to States. 80 Fed. Reg. at 33,979/3-80/1.

Petitioners—who discuss or cite general duty provisions in only five SIPs (Florida, Georgia, South Dakota, Tennessee, and West Virginia)—fail to meet their burden to demonstrate that EPA should not have SIP-called particular provisions because general duty-type provisions in those SIPs allegedly continuously limit emissions. In responding to comments about general duty provisions, EPA explained that these generic provisions do not meet applicable stringency requirements, are not clearly part of the emission limitations in the SIP-called provisions, and are likely not legally and/or practically enforceable. *Id.* at 33,903-04. They therefore do not serve as evidence that EPA acted unreasonably in calling SIP provisions inconsistent with fundamental CAA requirements.

Notably, in response to the SIP Call, States may elect to submit general duty-type provisions as alternative emission limitations during startup and shutdown to fill the gap created by exemptions in the SIP-called provisions. Although EPA recommended against this approach, the SIP Call does not prohibit the States from seeking to do so. However, EPA would evaluate such SIP submissions for compliance with applicable CAA requirements, as discussed below. *See* 80 Fed. Reg. at 33,979/3-80/1.

Stringency. The CAA includes numerous stringency requirements that States, pursuant to section 7410(a)(2)(A), must develop their emission limitations to meet during all modes of source operation. 80 Fed. Reg. at 33,890/1. Section 7410's command that SIPs "'meet the applicable requirements of this chapter' refers to the CAA as a whole." *Comm. for a Better Arvin*, 786 F.3d at 1176. SIP provisions applicable to nonattainment areas must meet various requirements specific to each NAAQS the area has not attained. 42 U.S.C. § 7410(a)(2)(I); 80 Fed. Reg. at 33,893/3. For example, section 7502(c)(1) requires nonattainment-area plans to "provide for the implementation of all reasonably available control measures," to include the adoption of

reasonably available control technology. *See* 80 Fed. Reg. at 33,890/1. Sources in a "serious" nonattainment area for particulate matter must comply with emission limitations reflecting the "best available control measures." 42 U.S.C. § 7513a(b)(1)(B). Major new or modified sources in nonattainment areas must "comply with the lowest achievable emission rate." 42 U.S.C. § 7503(a)(2). The PSD program requires certain sources in attainment areas to comply with emission limitations reflecting the "best available control technology." 42 U.S.C. § 7475(a)(4); *see In re RockGen Energy Ctr.*, 8 E.A.D. 536, 555 (EAB 1999) (alternative limits for startup and shutdown in PSD permit must meet this stringency). The regional haze program requires compliance with emission limitations reflecting the best available retrofit technology. 42 U.S.C. § 7491(b)(2)(A).

Emission limitations must reflect the level of control required by the applicable stringency requirements. Some of the general duty provisions cited in the comments fail to meet one or more of these stringency requirements, 80 Fed. Reg. at 33,904/1, and Petitioners make no attempt to prove otherwise beyond their meritless argument

(Ind. Br. 40) that "SIP provisions are not subject to *any* minimum stringency requirement."[24]

The *Sierra Club* decision supports EPA's position. The Court held that to ensure "continuous" section 7412-compliant controls applied at all times, including during SSM events, the general duty provision at issue there must have met section 7412's stringency requirements. 551 F.3d at 1027-28. The scope of what constitutes a comparable "section 7410(a)(2)(A)-compliant control" is broader, because section 7410 requires that SIPs include all emission limitations "necessary or appropriate" to meet applicable CAA requirements, such as attainment and maintenance of the NAAQS, protection of PSD increments, and protection of visibility. Thus, for example, if a major stationary source in a nonattainment area is exempt from the otherwise applicable reasonably available control technology requirements during startup and shutdown periods, any general duty provision intended to be an

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[24] Industry Petitioners' reliance (Ind. Br. 40) on *Citizens for a Better Envt. v. EPA*, 649 F.2d 522 (7th Cir. 1981), is misplaced. The Seventh Circuit evaluated whether a SIP provision requiring "sources of fugitive particulate matter to adopt an operating program and submit it to the state" was enforceable where the operating program was not incorporated into the SIP. *Id.* at 528. This is irrelevant to whether there are stringency requirements applicable to SIP provisions.

alternative emission limitation during those modes of operation would also need to meet a reasonably available control technology stringency level.

Clarity. Emission limitations and other control measures in SIPs must be drafted in an enforceable form. *See* 42 U.S.C. §§ 7410(a)(2)(A), (C); *Trustees for Alaska v. Fink*, 17 F.3d 1209, 1212 (9th Cir. 1994). This requires sufficient specificity to permit EPA or citizens to pursue enforcement. *Conservation Law Found. v. Busey*, 79 F.3d 1250, 1258 (1st Cir. 1996); *see also Council of Commuter Org. v. Gorsuch*, 683 F.2d 648 (2d Cir. 1982). Accordingly, some clear indication, such as a cross-reference, that a general duty provision is intended to be a component of a continuous emission limitation is necessary for such a provision to (at a minimum) be practically enforceable. *See also, e.g.*, 57 Fed. Reg. 13,498, 13,568/1 (Apr. 16, 1992) (enforceability requires that SIP provisions "specify clear, unambiguous, and measurable requirements" and "be enforceable in practice").

Contrary to Petitioners' arguments, this is not a question of wordsmithing or sentence structure; this clarity is essential to ensuring, consistent with the requirements of sections 7410(a)(2)(A) & (C), that

the "SIP emission limitation is clear on its face as to what the affected sources are required to do during all modes of operation." 80 Fed. Reg. at 33,943/3. *See also US Magnesium*, 690 F.3d at 1170; *see infra* Argument III(B)(3). This clarity also enables state and federal regulators, citizens, courts, and regulated entities to ascertain the emission limitations applicable to a source at all times. *Id.* at 33,943/3-44/1; *see also id.* at 33,903/2-3.

Accordingly, while States may include in their SIPs "design, equipment, work practice or operational standard[s]," 42 U.S.C. § 7602(k), these must be "components of a continuously applicable SIP emission limitation" in order to fulfill the function Petitioners ascribe to them. 80 Fed. Reg. at 33,890/1. As EPA explained, "[t]he general-duty clauses identified by these commenters are not part of the putative emission limitations contained in [the SIP-called] provisions." 80 Fed. Reg. at 33,903/2.

State Petitioners erroneously suggest (Br. 23) that *Texas v. EPA*, 690 F.3d 670 (5th Cir. 2012), reflects a rule that EPA "cannot dictate to States that their SIPs be worded or structured in a particular manner." The issue here is not a semantic quibble, but rather what is necessary

to have clear and enforceable SIP provisions. While the Fifth Circuit disagreed with EPA's concerns in *Texas*, *see id.* at 679 (characterizing issue as a mere preference for "negatively worded regulations over affirmatively worded regulations"), in a similar case, not mentioned by State Petitioners, the Fifth Circuit upheld EPA's objection to unclear SIP provisions that could undermine statutorily-mandated requirements, where the court found EPA had demonstrated a reasonable basis for concern. *BCCA Appeal Group v. EPA*, 476 Fed. Appx. 579, 586 (5th Cir. 2012). Together, these decisions reflect the court's assessment of the record support for EPA's position in each case; they do not refute the principle that SIP provisions must be clear and enforceable, or EPA's authority to disapprove unclear or unenforceable provisions. In this case, EPA has demonstrated a reasonable basis for concluding that the vaguely-worded general duty provisions at issue are no substitute for clear and continuous emission limitations as required by the Act, so this case is far more analogous to *BCCA Appeal Group* than to *Texas*.

Preconditions. State Petitioners argue (State Br. 26-27) that EPA wrongly "focuses on form, not substance" in concluding that many

general duty-type provisions are merely *preconditions* for an exemption, instead of independently enforceable, CAA-compliant emission limitations. State Petitioners are incorrect, as demonstrated by EPA's illustration using Alabama's SIP. 80 Fed. Reg. at 33,903/3. For a source to qualify for an exemption, Alabama's SIP-called provision requires that sources have taken "all reasonable steps to minimize levels of emissions that exceeded the emission standard" and that the "permitted facility was at the time [of the excess emissions] being properly operated." *Id.* Commenters argued that these preconditions limit emissions even during SSM events. *Id.* But the context within the SIP is revealing: the preconditions are located in a section addressing "*Exceptions to violations* of emission limitations," and are relevant only when emissions are *in excess of the emission limitation*. *Id.* at 33,903/3-04/1 (emphasis added). Further, these specific purported "general duties" are not themselves legally or practically enforceable. If an Alabama source fails to "minimize emissions" or "properly operate[]" during an SSM event, or elects not do so, then the source merely fails to qualify for an exemption and is liable for violating the applicable emission limitation, rather than being liable for violating the general

duties. If the source does satisfy these two preconditions, then the excess emissions are exempted, the gap in emissions control is not addressed by an enforceable alternative emission limitation, and the otherwise applicable emission limitation is discontinuous. 80 Fed. Reg. at 33,903/3-04/1. Thus, as EPA explained, such general duty clauses are not independently enforceable, CAA-compliant emission limitations because there is no period when the source is liable for violating them.[25] *Id.*

The same is true of the SIP provisions from Georgia, Florida and West Virginia (State Br. 20, 25-27). *See* 80 Fed. Reg. at 33,903/3. Like Alabama, Georgia exempts excess emissions when certain preconditions are met, such as application of "best operational practices to minimize emissions," and proper operation of air pollution control equipment. Georgia Rule 391-3-1.02(2)(a)(7). An alleged failure to operate using "best operational practices" is not independently enforceable because that precondition is only relevant where a Georgia source attempts to obtain an exemption (which no one can require a source to attempt).

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[25] By contrast, EPA's general duty requirements in 40 C.F.R. § 60.11(d) impose separate, additional requirements.

West Virginia Code St. R. § 45-7-10.3 and Florida Admin. Code section 62-210.700 suffer the same flaw.[26] *See, e.g.*, RTC at 40-44 (JA1152-56) (Florida). These specific general duties therefore do not "fill the gap" in regulation created by the exemptions in SIP-called provisions because they do not impose independently enforceable continuous control.

Industry Petitioners contend (Ind. Br. 39) that the CAA does not prohibit "expression of a work practice standard as a pre-requisite to another standard's non-applicability (e.g., as part of an exception)." Even assuming *arguendo* they were correct, that work practice standard must provide continuous emission control when applicable (e.g., startup), be legally and practically enforceable,[27] clearly be a component of a continuous emission limitation, and meet applicable

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[26] State Petitioners could seek to cure what they present as a problem of form rather than substance by revising their SIP provisions to clarify that the exemption preconditions are, in fact, enforceable alternative emission limitations. Even then the provisions may not meet applicable stringency levels. 80 Fed. Reg. at 33,904/1-2.

[27] Emission limitations, numerical or otherwise, must be both legally and *practically* enforceable to comply with sections 7410(a)(2)(A) & (C). For example, they must include "sufficient recordkeeping, reporting and monitoring requirements" tailored to the emission limitation to allow evaluation of compliance. 80 Fed. Reg. at 33,944/1 *see also, e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1018-19 (D.C. Cir. 2000).

stringency requirements. *See, e.g.*, 80 Fed. Reg. at 33,916/2-3.[28] EPA acknowledged that general duty-type provisions, if legally and practically enforceable, may be appropriate requirements to include in SIPs *in addition* to continuously applicable emission limitations, but concluded that the cited general duty provisions alone do not cure legal defects in the SIP-called provisions. *Id.* at 33,975/2 ("such generic clauses are not a valid substitute for more specific emission limitations" applicable during normal operation, including startup and shutdown.). *See also id.* at 33,889/3-90/1; 33,980/1.[29]

Petitioners have not established that any of the general duty provisions they rely upon actually qualify as an emission limitation or valid component thereof, or that EPA acted arbitrarily or capriciously in concluding that these provisions do not exonerate the SIP-called provisions.

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[28] EPA sometimes requires specific "work practices," e.g., requiring use of clean fuels during startup. *See, e.g.*, 40 C.F.R. pt. 63, subpart UUUUU, Table 3. By contrast, Petitioners appear to use "work practice" loosely to mean merely general duty-type provisions.

[29] EPA includes general duty provisions in its sections 7411 and 7412 standards in this manner, as requirements operating separate from, and in addition to, "independently … continuous limits on emissions." *See* 80 Fed. Reg. at 33,904/2.

No exemptions. Additionally, general duty provisions do not provide continuous emission control if the general duty provision *itself* is subject to the same exemptions that interrupt the ordinarily applicable emission limitation. This is the case with the general duty provision from Tennessee's SIP discussed by State Petitioners (State Br. 22). However, Tennessee itself did not discuss this provision in its comments. *See* Tenn. Dep't of Env't & Conservation Comment, EPA-HQ-OAR-2012-0322-0547 (JA531-37). The only instance of a commenter even citing this provision is buried in a nearly page-long string citation, without accompanying analysis, in comments by the Utility Air Regulatory Group. UARG Comments 55, EPA-HQ-OAR-2012-0322-0556 (JA569). Because Tenn. Comp. R. & Regs. 1200-03-20-.02(1) was not raised with reasonable specificity in public comments, Petitioners cannot rely on it here. 42 U.S.C. § 7607(d)(7)(B).

Regardless, Tenn. Comp. R. & Regs. 1200-03-20-.02(1) merely requires sources to "take all reasonable measures to keep emissions to a minimum during startups, shutdowns, and malfunctions." However, the Tennessee provision EPA SIP-called (Tenn. Comp. R. & Regs. 1200-3-5-.02(1)) provides impermissible authority to state personnel to provide

discretionary exemptions for excess emissions "which are necessary or unavoidable due to routine startup and shutdown conditions." 78 Fed. Reg. at 12,512/3; 80 Fed. Reg. at 33,965/1. This exemption could apply equally to Tennessee's general duty provision, and thus that provision does not provide continuous emission control consistent with CAA requirements as State Petitioners suggest.[30] Moreover, this provision does not reflect any applicable stringency requirements and is likely unenforceable. Thus, State Petitioners fail to demonstrate that EPA acted arbitrarily or capriciously in calling Tennessee's director's discretion SIP provision.[31]

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[30] Other general duty provisions suffer from the same flaw. *See, e.g.*, EPA RTC at 8-10 (JA1120-22) (Delaware).

[31] State Petitioners vaguely discuss South Dakota's SIP and unidentified "other rules" that they appear to argue create a general duty not to violate the NAAQS. State Br. 22 n.8. EPA SIP-called the cited provision for creating an automatic exemption for SSM events. 78 Fed. Reg. at 12,533/1-2; 80 Fed. Reg. at 33,971/1-2. EPA cannot respond in light of State Petitioners' failure to specify the "other rules," but a general duty not to violate the NAAQS suffers from all the flaws discussed in this section. Moreover, whether a State is attaining the NAAQS is irrelevant to whether a SIP provision creates an exemption for excess emissions during SSM events, which State Petitioners concede South Dakota's SIP-called provision in fact does. *See infra* Argument III(B)(1).

Next, Industry Petitioners argue that EPA "endorses the use of similar provisions" among EPA's *seven* recommended criteria for developing appropriate SIP alternative emission limitations applicable to specific modes of source operation such as startup and shutdown. Ind. Br. 40; *see* 80 Fed. Reg. at 33,913-14 (explaining seven criteria). However, general duty provisions are comparable to only two. 80 Fed. Reg. at 33,904/1. Those two, as with the other five, are not in and of themselves alternative emission limitations. They are objectives that EPA recommends States consider when developing a CAA-compliant alternative emission limitation. An appropriate numerical alternative emission limitation would, for example, apply during startup for a given source category and reflect consideration of whether the numerical limit functionally required the source to minimize its emissions consistent with applicable stringency requirements. Petitioners do not attempt to argue that the cited general duty provisions would potentially qualify as alternative emission limitations in light of the seven recommended criteria.

Similarly, State Petitioners argue (Br. 27) that Arkansas' automatic exemption provision "provides an alternative limitation," but

fail to identify what it is, and none is apparent from a review of Ark. Code Reg. § 19.1004(H).[32] State Petitioners thus fail to demonstrate that EPA acted unreasonably in calling this provision, which "explicitly states that excess emissions of [volatile organic compounds] 'will not be considered a violation" of the applicable emission limitation if they occur due to an 'unavoidable breakdown' or 'malfunction.'" 78 Fed. Reg. at 12,521/2.

Lastly, though State Petitioners list which States had provisions SIP-called for automatic exemptions (State Br. 24 n.9) or director's discretion (State Br. 28 n.13), because they have not sufficiently articulated specific arguments regarding automatic exemption provisions in North Carolina, South Carolina, Ohio, Louisiana and Kansas or impermissible director's discretion provisions in West Virginia, Alabama, Tennessee, Louisiana, Oklahoma, Kansas and Missouri, their arguments regarding those SIP provisions have been waived. *See* Fed. R. App. P. 28(a)(9); *Int'l Union of Painters and Allied*

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[32] This Arkansas SIP provision was not specifically addressed in comments. *See* RTC at 76 (JA1188). Thus, State Petitioners' arguments with respect to this provision have been waived. 42 U.S.C. § 7607(d)(7)(B); *see also, e.g., National Elec. Mfrs. Ass'n v. EPA*, 99 F.3d 1170, 1171 n.1 (D.C. Cir. 1996).

Trades, Local Unions No. 970 and 1144 v. N.L.R.B., 309 F.3d 1, 6 (D.C. Cir. 2002) ("A litigant must do more than simply point to the beginning of a string of incorporations by reference and ask the court to discern which arguments he seeks to advance.").

For all of these reasons, Petitioners fail to prove that EPA's SIP Call was arbitrary or capricious because they have not shown that the general duty provisions they raise[33] exonerate the exemptions allowed by the SIP-called provisions. *See* 80 Fed. Reg. at 33,890/1.

II. EPA REASONABLY DETERMINED THAT AFFIRMATIVE DEFENSES ARE INCONSISTENT WITH CAA REQUIREMENTS.

In the SSM Action, EPA significantly revised its statutory interpretations and determined that the CAA prohibits all affirmative defense provisions in SIPs. 80 Fed. Reg. at 33,851/1-53/1. This interpretation is not only reasonable, it is the best interpretation of the CAA. EPA's prior approach permitted States to adopt narrowly-drawn SIP provisions applicable only to penalties. That approach was flawed because it impinged on the jurisdiction of the federal courts. EPA now

[33] Including W.Va. Code St. R. § 45-2-9.2 (State Br. 27); Ga. Comp. R. & Regs. §§ 391-3-1.02(4)(a), 391-3-1.02(1)(c), 391-3-1.02(6)(b)(1)(iv) (State Br. 26 n.11); and Tenn. Comp. R. & Regs. § 1200-03-20-.09 (State Br. 32 n.15).

recognizes that any such provision is impermissible if it has the effect of altering or eliminating the courts' jurisdiction to determine liability or to impose any of the statutory remedies in the event of violations of SIP requirements.[34]

A. Affirmative Defenses Improperly Restrict the Role of the Courts.

1. Liability and Remedies Are Determined by the Courts, Not by States.

With respect to judicial enforcement of SIP provisions, the task of determining liability and imposing remedies for alleged violations of the CAA is within the jurisdiction of the courts, not the States. *See* 42 U.S.C. §§ 7413; 7604; 80 Fed. Reg. at 33,845/1, 33,847, 33,851-53. Congress created this enforcement structure, and EPA reasonably determined that SIPs cannot include affirmative defense provisions that undermine it. The SSM Action does not prevent States from considering factors comparable to an affirmative defense in the context of their own state administrative or judicial enforcement proceedings. *See* 80 Fed. Reg. at 33,855/2-56/1. In some circumstances, such an approach may be

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[34] State Petitioners' argument that affirmative defense provisions do not render emission limitations discontinuous because general duty provisions provide continuous emission limitations fails for all of the reasons discussed *supra* in Argument I(C).

appropriate for state law purposes, but when a State attempts to limit federal court authority, such provisions are improper.

EPA's CAA judicial enforcement actions "may be brought in the district court," seeking any or all statutory remedies. 42 U.S.C. § 7413(b). Similarly, the CAA citizen-suit provision allows any person to commence a civil action in district court against any other person alleged to be in violation of a CAA "emission standard or limitation." 42 U.S.C. § 7604(a). SIP provisions cannot undermine these enforcement provisions.

Congress, in section 7413(b), set out the range of court jurisdiction in the context of CAA civil judicial enforcement. This includes the authority to restrain violations, require compliance, determine noncompliance, impose fees and assess civil penalties. In addition, the courts have explicit authority "to award any other appropriate relief." *Id.* CAA section 7413(e) sets out "penalty assessment criteria." "A penalty may be assessed for each day of violation." 42 U.S.C. § 7413(e)(2). When assessing penalties, courts "shall" consider the criteria set out in section 7413(e), explicitly including "such other factors as justice may require." In short, the CAA enforcement structure allows

sources to raise factual arguments regarding liability and remedies for the court to consider, but without the impediments of affirmative defense provisions intended to limit the courts' authority. 80 Fed. Reg. at 33,981/3-82/1.

In *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) ("*NRDC*"), this Court determined that EPA lacked authority to promulgate an affirmative defense when setting standards under section 7412. *NRDC*, 749 F.3d at 1062-64. Subsequent to the *NRDC* decision, EPA determined that the language in section 7413(b) established the exclusive jurisdiction of district courts to determine liability, and that this jurisdictional grant of authority expressly included authority to impose and determine the scope of injunctive relief and/or penalties (including consideration of mandatory criteria in 7413(e)). 80 Fed. Reg. at 33,851/3. Consistent with *NRDC*, EPA reasoned that both States and the Agency lack authority to divest courts of this jurisdiction by taking remedies off the table through an affirmative defense. *Id.* at 33,852/1. *See also* 79 Fed. Reg. at 55,931-34. By their nature, affirmative defenses "limit or eliminate the authority of federal courts to determine liability or to impose remedies" by imposing

considerations different from those set out in the CAA. *Id.* EPA concluded that its prior practice of approving even narrowly-drawn affirmative defense provisions in SIPs was fundamentally flawed, determined that SIP provisions containing affirmative defenses are inconsistent with the Act and substantially inadequate, and thus issued the SIP call for specific affirmative defense provisions. 80 Fed. Reg. at 33,841/2; 33,844/3.

EPA's view governs so long as it is reasonable. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009), citing *Chevron*, 467 U.S. at 843-44. Once this Court determines that EPA's analysis is reasonable, no further inquiry is necessary. *See id.* at 218 n.4 (defending the approach of determining a reasonable agency interpretation at the outset, rather than first assessing the plain meaning of the statute). Given this Court's precedent and the strong statutory support for its determination that SIP affirmative defenses are prohibited by the CAA, the interpretation EPA implements through the SIP Call is eminently reasonable.

2. SIPs Cannot Undermine the Judiciary's Authority to Impose Remedies.

Petitioners rely on "the unique authority granted to States under the CAA" to distinguish between regulation under section 7412, where this Court has decided that affirmative defenses are barred, and state regulations imposed through a SIP pursuant to section 7410(a). Ind. Br. 53. This distinction makes no difference. Nothing about SIPs or inherent state authority would allow a State to disregard the CAA enforcement structure. Because that structure expressly contemplates judicial enforcement with a range of remedies to enforce SIP requirements, States simply lack authority to overwrite the courts' jurisdiction through an affirmative defense.

The crux of Petitioners' affirmative defense arguments is that the CAA provides States special authority to create affirmative defenses that alter federal court jurisdiction, authority EPA lacked under section 7412. *See* Ind. Br. 53; State Br. 34-35. Petitioners' distinction is flawed. State authority does not extend to development of SIP provisions inconsistent with CAA requirements. What matters is the relationship between the resulting SIP provision and the jurisdiction of the federal courts with respect to enforcement of that SIP provision. That

relationship is exactly the same whether the court is enforcing an EPA regulation under section 7412 or a state regulation in a SIP provision. A State has no more authority to alter the jurisdiction of the federal courts under sections 7413 and 7604 than does EPA.

In *NRDC*, this Court reviewed EPA's regulation of sources under section 7412. 749 F.3d at 1056-57. In that regulation, EPA set emission limitations but also created a narrowly drawn affirmative defense to penalties that sources could assert for violations during malfunctions. *Id.* This Court found that EPA's affirmative defense conflicted with the CAA's grant of jurisdiction to district courts to assess remedies. *Id.* at 1063. The same dynamic exists where States establish enforceable emission limitations under section 7410. Thus, while EPA agrees with Petitioners that the precise holding in *NRDC* does not specifically apply to affirmative defenses in SIPs, *see* State Br. 36; Ind. Br. 56, Petitioners fail to acknowledge that the reasoning supporting this Court's decision appropriately applies to such provisions. 79 Fed. Reg. at 55,929/2-30/2, 55,931/2-34/2 (setting out more detailed basis of affirmative defense interpretation); 80 Fed. Reg. at 33,851/3-53/2 (final action regarding affirmative defenses and key comments).

Basic requirements for a SIP are set out in section 7410(a)(2)(A)-(M). All SIPs must "include a program to provide for the enforcement of" the "enforceable emission limitations and other control measures, means, or techniques ... as may be necessary or appropriate" to meet CAA requirements. 42 U.S.C. §§ 7410(a)(2)(A), (C). In other words, States set enforceable emission limitations (much like EPA sets emission limitations under section 7412), and those emission limitations must meet all CAA requirements and must not conflict with the enforcement structure set out in sections 7413 and 7604. States cannot subvert CAA requirements for enforcement by limiting federal court jurisdiction. Nothing in section 7410 implies that state law embodied in SIP provisions may conflict with the federal enforcement scheme—in fact, the express role of EPA includes review of SIP provisions to ensure that they meet CAA requirements, including requirements with respect to enforcement. Legal Mem. at 2-7 (JA409-14). While States have "wide discretion" in formulating SIPs, *Union Elec.*, 427 U.S. at 250, EPA may not approve a SIP provision that would interfere with any CAA applicable requirement. 42 U.S.C. § 7410(k), (*l*); 7515. Where a SIP provision would act to limit the statutory

jurisdiction of the federal courts, it is reasonable for EPA to reject it as inconsistent with the Act. 79 Fed. Reg. at 55,929/2-30/2, 55,931/2-34/2; 80 Fed. Reg. at 33,851/3-53/1.

B. EPA Properly Advances a New Statutory Interpretation in the SSM Action.

1. EPA's Prior Interpretation of the CAA Allowing Affirmative Defenses Does Not Preclude the Agency From Prohibiting Such Defenses Now.

With respect to affirmative defenses in SIP provisions, EPA has revised its interpretation of the statutory requirements. 80 Fed. Reg. at 33,851/3-53/1. The SSM Action finds such provisions inconsistent with EPA's revised interpretation and thus substantially inadequate. 80 Fed. Reg. at 33,858/2. The Supreme Court has recognized that new statutory interpretations are entitled to the same deferential review as any other agency interpretation of statutory authority. *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), and *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

Where an agency revises or reverses its prior interpretation of a statute it must "supply a reasoned analysis" for its action. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 30. Where "the agency adequately explains the reasons for a reversal of policy, change is not invalidating,

since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Brand X*, 545 U.S. at 981. While "[u]nexplained inconsistency" may be "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice," *id.*, this Court's review of a change in agency interpretation of a statute is no stricter than its review of an initial agency action. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. at 514-16. Ultimately, it is the agency, and not the court, that is the "authoritative interpreter" of ambiguous statutes. *Brand X*, 545 U.S. at 983. EPA's current interpretation is reasonable for the reasons discussed above.

EPA's decision to change its interpretation of the CAA was not undertaken lightly. EPA issued a separate supplemental notice of proposed rulemaking to articulate the basis for its changed approach. *See* 79 Fed. Reg. at 55,931-34. There, EPA explained that this Court's decision in *NRDC* rebutted the logic that formed the foundation for EPA's prior interpretation of the CAA to allow narrowly-drawn affirmative defense provisions. *Id.* EPA explained that the *NRDC* decision: (1) found that EPA's affirmative defense impermissibly altered

the jurisdiction of courts to assess penalties in enforcement actions; (2) rejected the argument that affirmative defense provisions merely specify when penalties are "appropriate"; (3) rejected the argument that EPA's general authority to create regulations "necessary to carry out [its] functions" provided authority to create affirmative defense provisions; (4) rejected the argument that statutory silence with respect to affirmative defenses created ambiguity that could allow for such defenses; and (5) rejected as inconsistent with the statutory structure EPA's argument that affirmative defenses are necessary to account for the "tension between requirements that emission limitations be 'continuous' and the practical reality that control technology can fail unavoidably." *Id.* at 55,932/3-34/2. In *NRDC* this Court thus rejected the same arguments that EPA previously used to interpret the CAA to allow even narrowly-drawn affirmative defenses in SIP provisions. Under the CAA's enforcement scheme, this Court held, "deciding whether penalties are 'appropriate' in a given private civil suit is a job for the courts, not for EPA," because Congress had expressly granted courts that jurisdiction. *NRDC*, 749 F.3d at 1063.

This situation is entirely different from that considered by the Supreme Court in *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117 (2016). In *Encino,* the Court declined to extend deferential review to an agency's change in position where the change was issued "without the reasoned explanation that was required." *Id.* at 2126. Instead of providing reasoning supporting its new policy, the agency in *Encino* "said almost nothing." *Id.* at 2127. Here EPA extensively explained the reasons for the change. *See, e.g.*, 79 Fed. Reg. at 55,931-34.

In light of the Court's reasoning in *NRDC*, EPA determined that its prior guidance to States regarding affirmative defense provisions in SIPs was wrong. 80 Fed. Reg. at 33,851/1-53/1. EPA now agrees that it has no authority to create affirmative defenses in its own regulations because to do so would alter the jurisdiction of the Court to determine liability or to assess *any form of remedy* under section 7413(b) or section 7604, or civil penalties in accordance with the requirements of section 7413(e). 80 Fed. Reg. at 33,853/2; 79 Fed. Reg. at 55,934/1; 42 U.S.C. §§ 7413(b), 7604. For the same reason, States lack authority to create affirmative defense provisions in SIPs. *Id.* Because affirmative defense provisions are inconsistent with the enforcement requirements of the

CAA, EPA cannot approve such provisions for inclusion in SIPs and has authority under section 7410(k)(5) to direct States to remove any such existing SIP provisions. *See generally*, *Luminant*, 714 F.3d at 857-58 (rejecting industry argument that EPA was bound by prior SIP approval, holding that "EPA's previous, admittedly erroneous, approval of a prior Texas SIP provision, does not mandate its approval of the current SIP revision at issue").

Industry Petitioners recycle EPA's prior argument that an affirmative defense was permissible because it merely allowed a State to "define" emission limitations and was within State discretion. *See* Ind. Br. 58, citing Br. of Resp't EPA at 22-23, *Luminant*, 714 F.3d 841 (No. 10-60934) (JA891-92). EPA has subsequently determined that this argument is unsustainable.[35] States do not have discretion to negate statutory jurisdiction of the federal courts. *See* 80 Fed. Reg. at 33,854/2-55/1. If affirmative defenses establish criteria that, if met, suspend

[35] Petitioner SSM Coalition similarly argued as an amicus in *NRDC* that EPA could pre-emptively eliminate court jurisdiction merely by constructing the emission limitation with an affirmative defense to foreclose it. SSM Coalition Amicus Brief, *NRDC*, 749 F.3d 1055 (D.C. Cir. 2014) (No. 10-1371), 2013 WL 3894853 at *10-14. The Court did not accept this theory.

emission limitations, then this creates a different deficiency. EPA explained that this would constitute a conditional exemption in emission limitations, contrary to the requirement for continuous emission limitations. Such provisions interfere with enforcement by EPA and other parties. *See supra* Argument I(A).

As Industry Petitioners highlight, EPA historically recognized that "imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of an owner or operator may not be appropriate." Ind. Br. 54, citing 1999 Guidance at 1-2 (JA398-99). EPA still holds this view, depending upon the facts of a violation, but recognizes that its view on when a penalty is, or is not, appropriate is not controlling. *See NRDC*, 749 F.3d at 1064 ("That is a good argument for EPA to make to the courts … But it does not suffice to give EPA authority to create an affirmative defense."). A source subject to enforcement can make this argument directly to the court in that action. 79 Fed. Reg. at 55,933, n.35.

Industry Petitioners incorrectly represent that the Ninth Circuit "has considered the lawfulness of affirmative defenses." Ind. Br. 55. This statement misrepresents the facts and holding of *Montana*

Sulphur & Chem. Co. v. EPA, 666 F.3d 1174 (9th Cir. 2012). In *Montana Sulphur*, a source challenged an EPA Federal Implementation Plan, arguing, *inter alia*, that EPA arbitrarily imposed numeric limits on flaring emissions during SSM events. 666 F.3d at 1180. EPA provided an affirmative defense to penalties, but the source argued that the defense should apply to injunctive relief as well. *Id.* at 1193. EPA successfully argued that injunctive relief must remain available to make the limits continuous and enforceable, and the court held that "EPA reasonably interpreted the Clean Air Act to require continuous limits on emissions." *Id.* In other words, the Court did not address the underlying lawfulness of affirmative defense provisions.

Petitioners also rely on *Arizona Public Serv. Co. v. U.S. E.P.A.*, 562 F.3d 1116 (10th Cir. 2009). Ind. Br. 55. Although the Tenth Circuit held that EPA "established 'an adequate rationale' for the affirmative defense," the court did not consider the impact of affirmative defenses on court jurisdiction. *See Arizona Public Service Co.*, 562 F.3d at 1130.

Neither case provides any insight with respect to the issues before this Court.[36] Both decisions relied on EPA's prior interpretation as a reasonable construction of ambiguous statutory provisions; neither suggests that an alternative interpretation of the CAA—such as the one adopted in the SSM Action— could not also be reasonable. *See* 80 Fed. Reg. at 33,587/1, n.51.

2. In *Luminant* the Fifth Circuit Affirmed EPA's Action on a Texas SIP Submission Under Chevron Step Two, Leaving Room for the Agency to Reconsider its Interpretation.

The Fifth Circuit decided *Luminant* under *Chevron* step two in the face of perceived statutory silence concerning affirmative defense provisions in SIPs. Petitioners ignore this reality and rely on the erroneous conclusion that the Fifth Circuit held, under *Chevron* step one, that the CAA authorized the affirmative defense for malfunctions. *See* Texas Br. 8-12. This conclusion disregards the plain language of the *Luminant* decision. *See* 80 Fed. Reg. at 33,856-57. When addressing

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[36] Industry Petitioners inaccurately claim that EPA declared affirmative defense provisions unlawful without examining those provisions. Ind. Br. 60 n.29. EPA's State-by-State examination of SIP affirmative defense provisions is set out both in the Supplemental Rule, *see* 79 Fed. Reg. at 55,935-54, and the SSM Action, *see* 80 Fed. Reg. at 33,957-74.

environmental challenger claims that EPA's approval of the affirmative defense for malfunctions was unlawful, the Fifth Circuit wrote:

> Here, section 7413 does not discuss whether a state may include in its SIP the availability of an affirmative defense against civil penalties for *unplanned* SSM activity. 42 U.S.C. § 7413. Accordingly, we turn to step two of *Chevron* and ask whether the EPA's interpretation of section 7413, as authorizing an affirmative defense for *unplanned* SSM activity, is entitled to deference. *Chevron*, 467 U.S. at 843.

Luminant, 714 F.3d at 852 (emphasis added). In deciding the issue, the court stated:

> The EPA submits that the ... affirmative defense for unplanned SSM events is narrowly tailored ... consistent with the penalty assessment criteria ... We hold this to be a *permissible interpretation* of section 7413, warranting deference.

Luminant, 714 F.3d at 853 (emphasis added).

Similarly, when addressing industry challenger claims that EPA's disapproval of affirmative defenses for startup, shutdown, and maintenance was unlawful, the court stated:

> Here, section 7413 does not discuss whether a state may include in its SIP the availability of an affirmative defense against civil penalties for *planned* SSM activity. 42 U.S.C. § 7413. Accordingly, we turn to step two of *Chevron* and ask whether the EPA's interpretation of section 7413, as *not authorizing* an affirmative defense against civil penalties for *planned* SSM activity, is entitled to deference. *Chevron*, 467 U.S. at 843.

Luminant, at 856 (emphasis added). Using the same analytical approach, the court concluded:

> We hold this to be a *permissible interpretation* of section of section 7413 of the Act, warranting deference.

Luminant, at 857 (emphasis added). In upholding EPA's actions, the court deferred to the Agency's reasonable interpretation for both the approval and disapproval of affirmative defense provisions—clearly invoking *Chevron* step two. *See id.* at 859.

Petitioners' argument that *Luminant* was decided on *Chevron* step one relies on a strained reading of footnote 9. In that footnote the Fifth Circuit stated:

> [T]he availability of the affirmative defense does not negate the district court's jurisdiction to assess civil penalties using the criteria outlined in section 7413(e), or the state permitting authority's power to recover civil penalties, it simply provides a defense, under narrowly defined circumstances, if and when penalties are assessed.

714 F.3d at 853 n.9. This demonstrates only that the court deferred to EPA's interpretation, not that the CAA compels EPA's interpretation. In a post-*Brand X* world, courts are well aware that if they find statutory language unambiguous, it is important to state this clearly. The language Petitioners rely upon is insufficient to support their claim. *See United States v. Home Concrete & Supply, LLC*, 132 S. Ct.

1836, 1846 (2012) (Scalia, J., concurring in part and concurring in the judgment) (implicitly recognizing that, in cases decided post-*Brand X*, courts are aware of the need to "utter the magic words 'ambiguous' or 'unambiguous'" in order to expand or abridge executive power).

After *Brand X*, it is unlikely that a court intending to foreclose further statutory interpretation would choose to do so through a footnote, let alone a footnote at odds with other unequivocal statements that it relied upon *Chevron* step two concerning the legal basis for affirmative defenses. Moreover, prior drafts of the *Luminant* decision are inconsistent with Petitioners' argument that *Luminant* was decided under *Chevron* step one. [37]

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[37] The Fifth Circuit issued two withdrawn and superseded decisions in *Luminant*. The language in footnote 9 appears to be taken, *verbatim*, from the last sentence of a paragraph originally in the body of the discussion section of the Fifth Circuit's July 30, 2012, decision. *See* July 30th Decision at 12-13 (Add. 72). The preceding sentences of that draft establish that the CAA "is silent" as to whether a State may include affirmative defenses in its SIP, and affirms that EPA's duty in reviewing Texas's SIP is to ensure "consistency with the [CAA] requirements." *Id.* That language referencing statutory silence remains in the final *Luminant* decision. *Luminant*, 714 F.3d at 852. The fact that, in a prior draft, the Fifth Circuit highlighted statutory silence when using the language of footnote 9 to discuss the meaning of section 7413(e) makes it unlikely that a footnoted version of the same language, in a subsequent draft, indicates the Fifth Circuit intended to advance a

Footnote continued...

As discussed previously, *supra* Argument II(A), EPA has now concluded in the SSM Action that the enforcement structure of the CAA is best interpreted to preclude any affirmative defense provision in SIPs because they operate to limit federal court jurisdiction to determine liability and remedies in an enforcement case. 80 Fed. Reg. at 33,851. The relevant issue for this Court is whether EPA's approach is reasonable. The Fifth Circuit's *Luminant* decision, which addressed the reasonableness of a prior EPA interpretation, does not control.[38]

C. Texas Petitioners' Unique Arguments Lack Merit.

Texas Petitioners also argue that the SSM Action is unlawful because: 1) it contradicts *Luminant*; 2) two Texas courts have reviewed CAA citizen suits where defendants invoked affirmative defenses; and 3) those SIP provisions are part of a larger emissions control strategy and cannot be separately SIP-called. These arguments miss the mark.

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clear statutory interpretation of the meaning of section 7413(e) under *Chevron* step one.

[38] Contrary to Texas Petitioners' claims, the SSM Action is consistent with EPA's regional consistency regulations. Texas Pet. Br. 11. EPA seeks to assure "fair and uniform application" of EPA rules, procedures, and policies in implementing the CAA. 40 C.F.R. § 56.3. Treating affirmative defense provisions comparably in all States, including Texas, is plainly consistent with those regulations.

1. Issue Preclusion Does Not Apply.

Texas Petitioners rely on the doctrine of issue preclusion to argue that *Luminant* prevents EPA from changing its interpretation of the CAA on affirmative defenses in SIP provisions. This reasoning is flawed. Issue preclusion generally bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001); *see also Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Parties can use the doctrine either offensively—to advance a party's affirmative claims, or defensively—to defend against claims brought by another party.

Issue preclusion only applies where parties litigated the "same issue" in an earlier suit. *Taylor*, 553 U.S. at 892. The issue presented here is a different one—the issue in *Luminant* was whether EPA's prior interpretation was reasonable; here the issue is whether EPA's revised interpretation following the *NRDC* decision is reasonable. This Court must review the reasonableness of EPA's revised interpretation. Thus, the issue here was not "actually litigated and resolved" in *Luminant*. Additionally, because the Fifth Circuit did not even consider the issue

being raised here, it certainly did not make a decision on this issue that was "essential" to its judgment, as *New Hampshire* requires. 532 U.S. at 748-49. Because this rule presents neither the "same issue" considered by the Fifth Circuit in *Luminant* nor an issue that was "essential" for the Fifth Circuit to consider, issue preclusion cannot apply.[39]

Even if the requirements for issue preclusion were present (which they are not), there should be no issue preclusion because there has been a change in the "legal context." *See Bobby v. Bies*, 556 U.S. 825, 834 (2009) ("[E]ven where the core requirements of issue preclusion are met, an exception to the general rule may apply when a 'change in [the] applicable legal context' intervenes."). By changing its legal interpretation regarding affirmative defenses in SIP provisions, EPA

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[39] In cases involving the United States, traditional issue preclusion principles are limited by the nonacquiescence doctrine. That doctrine generally recognizes that agencies may "nonacquiesce" in aspects of a decision of one judicial circuit when the same issue is presented in challenges in other circuits. *See generally* Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L. J. 679, 687 (1989). The nonacquiescence issue is not presented here because, for the reasons discussed in the text, EPA believes that this case does not present the same issue that was the subject of *Luminant*.

has significantly changed which legal principles apply to this case. *See* 80 Fed. Reg. at 33,856-57. EPA's changed interpretation of the CAA operates as an intervening change in legal context. *See generally Montana v. United States*, 440 U.S. 147, 155 (1979) (recognizing that where "legal principles have changed significantly" the issue preclusion does not apply). It also "patently would be unfair to apply one rule" for Texas Petitioners, and another rule for other regulated parties. *See American Medical Int'l, Inc. v. Secretary of Health*, 677 F.2d 118, 124 (D.C. Cir. 1981). Issue preclusion "is not meant to create vested rights in decisions ... thereby causing inequities among (similarly situated parties)." *Id.* Finally, "the public nature of the issues presented counsels against strict application of collateral estoppel." *Environmental Defense v. EPA*, 369 F.3d 193, 202-03 (2d Cir. 2004).[40]

Texas Petitioners' also argue that EPA cannot interpret CAA enforcement provisions because they "confer jurisdiction on the federal courts," Texas Pet. Br. 11. This confuses the issue. In *Luminant,* the Fifth Circuit expressly deferred to EPA when considering the impact of

[40] Issue preclusion is part of the law of collateral estoppel. *See Consolidated Edison Co. of New York v. Bodman*, 449 F.3d 1254, 1258 (D.C. Cir. 2006).

section 7413. Thus, the Fifth Circuit disagrees with Texas Petitioners' premise. Additionally, in interpreting the CAA EPA must consider the courts' role, and cannot ignore a State's attempt to restrict courts' enforcement jurisdiction. EPA's interpretation is not determining the bounds of court jurisdiction, it is accounting for the fact that Congress authorized courts to determine an appropriate remedy for liable parties.[41]

2. EPA Reasonably Determined that the Texas Affirmative Defense Provision is Substantially Inadequate.

Texas Petitioners argue that even if *Luminant* is not controlling, the fact that citizen suit plaintiffs have brought two enforcement actions in Federal District Courts in Texas proves that affirmative defense provisions are, necessarily, consistent with CAA requirements.

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[41] Texas Petitioners also rely upon the "mandate rule" to support their theory. *See* Texas Br. 9 n.3. This rule provides that "a legal decision made at one stage of litigation, unchallenged in a subsequent appeal ... becomes the law of the case for future stages of the same litigation..." *Williamsburg Wax Museum v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987) (citations omitted). Here the Court is addressing a separate case focusing on the reasonableness of a changed interpretation of the CAA. *Brand X* permits changed interpretations, and the mandate rule does not apply because this case is not a future stage of any prior litigation. *See also* 80 Fed. Reg. at 33,857 (noting inapplicability of mandate rule).

See Texas Br. 12-13, citing *Sierra Club v. Energy Future Holding Corp.*, No. 12-108, 2014 WL 2153913 (W.D. Tex. Mar. 28, 2014) and *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 66 F. Supp. 3d 875 (S.D. Tex. 2014). This argument mischaracterizes these cases.

Contrary to Petitioners' assertion, *see* Texas Pet. Br. 13, EPA did respond to comments regarding these cases. To commenters asserting that these cases prove that affirmative defense provisions do not interfere with enforcement, EPA explained that even if this were so, it has no bearing on the legal basis for such provisions. To commenters arguing that the affirmative defense impede enforcement, EPA acknowledged problems with implementation of such provisions, but likewise concluded this does not alter the lack of legal basis for such provisions. *See* 80 Fed. Reg. at 33,861/2-3; 33,869/3-70/2. In neither case was the court evaluating the underlying legal basis for affirmative defense provisions in SIPs.

The actual decisions also fail to support Petitioners' claims. In *ExxonMobil*, which was vacated and remanded by the Fifth Circuit, the district court first assessed the penalty factors set out in 42 U.S.C. § 7413(e), decided no penalty was warranted, and declined even to

consider the affirmative defense. *ExxonMobil*, 66 F. Supp. 3d at 914, vacated and remanded by *Env't Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, No. 15-20030, 2016 WL 3063302, at *16 (5th Cir. May 27, 2016). In *Energy Future Holding Corp.*, the Court did consider the affirmative defense issue, but did not find that a penalty was warranted. *Energy Future Holding Corp.*, 2014 WL 2153913 at *12-13, *23-24. Neither decision speaks to the relevant question: what would happen where a court finds that penalties are warranted, but is precluded from reaching the issue by an affirmative defense? In that event a court would be compelled either to disregard otherwise binding SIP provisions or to disregard its duty to assess penalties independently, and consistent with the statutory requirements of section 7413(e).

Petitioners also argue that this Court's reasoning in *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997), *modified*, 116 F.3d 499 (D.C. Cir. 1997), prohibits the SSM Action because it "provides no alternative ... and is thus unlawful." Texas Br. 16. This argument is a misapplication of this Court's holding. *See* 80 Fed. Reg. at 33,877-79 (discussing *Virginia* and related cases). We address this in Argument III(B)(2),

infra. Texas will ultimately determine the impact of the SIP Call on sources within the State, impacts that depend on "how the state has chosen to revise the SIP to address excess emissions during SSM events." 80 Fed. Reg. at 33,848/3-49/1. EPA provided guidance on a variety of approaches that the State may elect to consider as part of the response to the SIP Call. *See id.* at 33,978/3-82.

Finally, Texas Petitioners claim the State cannot remove the affirmative defense for malfunctions without undermining its SIP. That argument fails for several reasons. First, Texas cannot retain an unlawful SIP provision merely because it is part of a larger plan. *See infra* Argument III(B)(2). Second, if eliminating the affirmative defense makes any emission limitations in the Texas SIP more stringent than Texas intends, then the State may elect to revise its SIP accordingly. *See* 78 Fed. Reg. at 12,489/2; 80 Fed. Reg. at 33,931/1. Third, the affirmative defense is a relatively new and narrow addition to the Texas SIP, *see* 75 Fed. Reg. at 68,989 (approving the affirmative defense for malfunctions at issue here in 2010). The Texas SIP existed for decades without this affirmative defense; EPA's action requiring the State to remove this provision cannot make emission limitations adopted and

approved into the SIP, independent of and long before the affirmative defense, "more stringent" than when the State originally adopted such limitations.

III. EPA REASONABLY CONSTRUED ITS AUTHORITY TO ISSUE THE SIP CALL TO CORRECT THE NONCOMPLIANT SIP PROVISIONS.

Section 7410(k)(5) states that "[w]henever" EPA finds that a SIP is "substantially inadequate" to "attain or maintain the relevant [NAAQS], to mitigate adequately [certain] interstate pollutant transport ... or to otherwise comply with any requirement of this chapter," then EPA "shall" require the State to "revise the [SIP] as necessary to correct such inadequacies." Under the "any requirement" grounds for substantial inadequacy, EPA reasonably found that each of the SIP-called provisions fails to meet fundamental CAA requirements.

A. EPA Reasonably Construed the Term "Substantially Inadequate" and Considered Relevant Factors for its "Substantially Inadequate" Findings.

By directing EPA to issue a SIP call and requiring States to correct SIPs "whenever" EPA finds them to be substantially inadequate, Congress authorized EPA to require States to rectify SIP deficiencies in previously-approved SIP provisions. 80 Fed. Reg. at 33,925/3. This reflects Congress's expectation that SIPs must be updated to reflect

changed circumstances or legal requirements. *Id.* at 33,937/3-38/1; *see, e.g.*, *id.* at 33,661/1-2, 33,919/3.

EPA reasonably construed its SIP call authority for provisions that fail "to otherwise comply with any requirement" of the Act. Here EPA interpreted that authority to apply to four types of deficient SIP provisions: (1) automatic exemptions; (2) unbounded director's discretion; (3) overbroad enforcement discretion; and (4) affirmative defenses. 80 Fed. Reg. at 33,927-29. The only pertinent question raised by Petitioners is whether EPA's substantial inadequacy findings are reasonable and fall within the Agency's authority. The answer clearly is "yes."

The CAA does not define "substantially inadequate" and EPA's reasonable construction is entitled to deference under *Chevron,* 467 U.S. at 842-43. 80 Fed. Reg. at 33,926. Given that "substantially inadequate" is ambiguous, in the context of the "any requirement" grounds for making findings EPA interpreted "substantially adequate" "in light of the specific purposes for which the SIP provision at issue is required, and thus whether the provision meets the fundamental CAA requirements applicable to such a provision." *Id.* at 33,926/2. More

broadly, EPA interpreted section 7410(k)(5) to protect the "fundamental integrity of the CAA's SIP process and structure" and reasoned that this purpose would be "undermined if emission limitations relied upon to meet CAA requirements related to protection of public health and the environment can be violated without potential recourse." *Id.*; *see id.* at 33,936/2-3 & 33,937/2.

The deficient provisions fail to comply with fundamental CAA requirements. *Id.* at 33,927/2-29; *supra* Argument I(A), I(B), II(A). For example, as explained above, automatic exemptions result in SIP emission limitations that are not "continuous." 80 Fed. Reg. at 33,927. Director's discretion provisions authorize States to revise SIP emission limitations without complying with procedural and substantive CAA requirements. *Id.* at 33,927/3-29. Overbroad enforcement discretion provisions bar enforcement by EPA or citizens if the State elects not to enforce, "undermin[ing] the enforcement structure of the CAA." *Id.* at 33,929/2. Affirmative defense provisions "alter the statutory jurisdiction of federal courts … to determine liability and impose remedies" for CAA violations, in violation of sections 7413 and 7404. *Id.* at 33,929/3.

Petitioners prefer an alternative construction of the term "substantially inadequate" that involves different considerations intended to limit EPA's authority. EPA's construction, however, is eminently reasonable because it ties EPA's substantial inadequacy finding directly to CAA requirements that SIP provisions must meet.

Nor can Petitioners reasonably dispute that these legal requirements are fundamental. This Court found such requirements essential upon rejecting prior EPA approaches. *See Sierra Club,* 51 F.3d at 1027-28; *NRDC,* 749 F.3d at 1062-64. EPA explained the importance of these requirements to SIPs and CAA objectives. For example, Congress required continuous emission limitations "to assure that [SIPs] would achieve these goals as well as be consistent with the enforcement structure of the [Act]." 80 Fed. Reg. at 33,936/3; *see, e.g.,* H.R. Rep. No. 95-294, at 92 (emission limitations are a "fundamental tool for assuring" NAAQS attainment and maintenance, and unless "complied with at all times, there can be no assurance that ambient standards will be attained and maintained."). Similarly, SIP provisions that preclude EPA or citizen enforcement for excess emissions, or that alter or eliminate federal court jurisdiction to determine liability and

remedies, conflict with the enforcement structure in sections 7413 and 7604. 80 Fed. Reg. at 33,929/2-3. Provisions that allow States to modify SIPs unilaterally, ignoring the SIP revision process and applicable substantive standards, undermine the Act's requirements for transparency, public participation, and enforceability. *Id.* at 33,927/3-29/1.

B. Petitioners' Challenges to EPA's Authority Under Section 7410(k)(5) Are Meritless.

1. Factual Findings Regarding "Actual" Impacts Were Not Required.

Petitioners argue that EPA's substantial inadequacy findings were flawed because EPA identifies "potential" problems that could result from each of the SIP-called provisions' legal defects. Petitioners assert that EPA must make detailed factual findings documenting real-world adverse impacts from each deficiency, such as demonstrating that an exemption resulted in a specific NAAQS violation at a particular monitor in a particular State. *See* State Br. 13-21. These arguments are incorrect.

First, there is no requirement that the substantial inadequacies at issue here be supported by the factual analysis Petitioners seek. 80 Fed. Reg. at 33,931/3-37/1; 33,926/2-27/1. There are instances that may call

for such analysis (where, for example, a SIP call is based upon the other grounds in section 7410(k)(5), *i.e.*, substantially inadequate to "attain or maintain" NAAQS or "mitigate adequately [certain] interstate pollutant transport"). *Id.* at 33,932 & nn.309-310 (noting examples). But the fact that such an analysis is appropriate for SIP calls based on other grounds does not undermine EPA's interpretation that, when the question is whether the SIP fails to comply with "any requirement" of the Act, EPA may reasonably promulgate a SIP call to address *legal* deficiencies in SIP provisions without such a technical analysis. The Agency has promulgated other SIP calls in this manner, *id.* at 33,932-33 & nn.311-317, and the Tenth Circuit rejected a challenge like Petitioners' here. *See US Magnesium*, 690 F.3d 1157.

US Magnesium involved a SIP call to Utah for malfunction provisions. Those provisions provided exemptions from emission limitations and authorized unilateral emission limitation revisions. The *US Magnesium* petitioner argued that EPA must "set out facts showing that the [SIP provision] has prevented Utah from attaining or maintaining the NAAQS or otherwise complying with the CAA." 690 F.3d at 1167. The Tenth Circuit rejected this argument, concluding that

EPA may promulgate a SIP call "in a situation like this, where the EPA determines that a SIP is no longer consistent with the EPA's understanding of the CAA." *Id.* at 1168; see *also Sierra Club v. Georgia Power Co.,* 443 F.3d 1346, 1355 (11th Cir. 2006) ("If the EPA believes that its current interpretation of the Clean Air Act requires Georgia to modify its SSM Rule, the EPA should require the State to revise its SIP").

Industry Petitioners' efforts (Br. 30-32) to distinguish *US Magnesium* lack merit. In that case, neither EPA nor the Court relied on data regarding the impacts of the deficient provisions to resolve the claim. Petitioners' argument that the State did not challenge that SIP call is irrelevant because the industry petitioner raised essentially the same issues as Petitioners here, and the court fully considered and rightly rejected those claims. *See* 80 Fed. Reg. at 33,942/2-43/1.

Not only is *US Magnesium* directly on point, it is consistent with the statute and clearly correct. *See* 80 Fed. Reg. at 33,933, 33,936 & 33,942-43. Congress used the word "or" when listing the three independent grounds in section 7410(k)(5) for issuing a SIP call. The proviso that the third ground applies where SIPs "otherwise" fail to

comply with a CAA requirement further confirms that this encompasses defects independent of the first two grounds. Petitioners' approach, by contrast, would merge the third ground with the first, rendering the "any requirement" provision surplusage.

The Supreme Court in *EPA v. EME Homer City Gen.*, 134 S. Ct. 1584 (2014), rejected an analogous effort by State and industry petitioners to avoid a federal implementation plan by urging the Court to read into section 7410(a)(2)(D)(i) an EPA analysis requirement before state action is required to meet SIP requirements. The Court explained that "[w]hen Congress elected to make EPA's input a prerequisite to state action under the Act, it did so expressly," and thus declined to adopt "an information submission obligation on EPA Congress did not impose." *Id.* at 1601. This same reasoning precludes imposing Petitioners' factual threshold on section 7410(k)(5) for the legally deficient provisions at issue here. *See also* 80 Fed. Reg. at 33,936/3-37/1.

Petitioners' interpretation would also nullify EPA's authority to address specific types of SIP deficiencies, including obligations to protect visibility, 42 U.S.C. §§ 7410(a)(2)(D)(i)(II) & 7491-92, to address non-NAAQS pollutants in new source review permit programs, *id.* §§

7470-79 & 7503, and the host of statutory authority, resource, and substantive requirements imposed in sections 7410(a)(2)(A)-(M). So long as the State was presently attaining the NAAQS, Petitioners' construction would insulate even the most glaring SIP deficiencies. 80 Fed. Reg. at 33,933/3. This would cause policy results at odds with the Act's pollution control goals. *See* 42 U.S.C. §§ 7401(b)(1)&(4). Even if a State presently attains the NAAQS, air quality can be significantly undermined if a SIP lacks required legal safeguards to assure that excess emissions are appropriately controlled in the future.

Therefore, EPA reasonably reads the statute to authorize SIP calls to address fundamental legal deficiencies in SIPs without detailed factual findings regarding the specific consequences of each such deficiency. Moreover, while EPA did not – and was not required to – perform a factual analysis of the sort Petitioners demand for each deficient SIP provision, the Agency did note substantial evidence illustrating adverse "real-world" impacts to which deficiencies of this sort have given rise. *See supra* at 18-19.

Petitioners claim textual hooks for the type of factual finding they allege is required, citing section 7410(k)(5)'s use of the word "finds," and

the phrase "information available to the Administrator" in section 7410(a)(2)(H)(ii). State Br. 13; Ind. Br. 28, 30-32. These arguments are misplaced and unavailing because "information available" may include an EPA finding that a SIP provision is legally deficient.

First, section 7410(a)(2)(H)(ii) is inapposite. The fact that it includes language not present in section 7410(k)(5), if anything, undermines Petitioners' argument. Congress added section 7410(k)(5) to the CAA in 1990. Section 7410(a)(2)(H)(ii) was part of the 1970 Act. *See* 80 Fed. Reg. at 33,934-35; *US Magnesium*, 690 F.3d at 1167. Furthermore, the two provisions serve different, though related purposes. Section 7410(a)(2)(H)(ii) sets out part of the infrastructure elements that SIPs must contain, ensuring States have legal authority to revise SIPs. Section 7410(k)(5) establishes when EPA can promulgate a SIP call. 80 Fed. Reg. at 33,934/2. Had Congress intended section 7410(k)(5) to mirror the older and more general provision, it would have said so expressly. By enacting different terms in the two provisions

Congress, if anything, indicated that it did not intend the text upon which Petitioners rely to apply to section 7410(k)(5).[42]

Even if section 7410(a)(2)(H)(ii) were relevant, neither "finds" nor "information" must be construed to refer *only* to Petitioners' preferred factual findings. 80 Fed. Reg. at 33,934. Dictionary definitions of these terms are often generic, *e.g., Merriam Webster's Collegiate Dictionary* (10th Ed. 1996), at 436 ("find" includes "to determine and make a statement about"), 599 ("information" includes "knowledge obtained from investigation, study, or instruction"), and use of these terms in their statutory context is therefore more probative. Neither sections 7410(k)(5) nor 7410(a)(2)(H)(ii) specify what EPA must base these determinations upon. EPA reasonably construed these terms to mean that the nature of the finding and information depends upon the grounds for the SIP call and deficiency at issue. Thus, technical findings regarding NAAQS attainment and maintenance may be based on technical information, and legal findings regarding failure to comply

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[42] *See Brown v. Gardner*, 513 U.S. 115, 120 (1994) ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal citation and quotation marks omitted).

with the Act's requirements may be based on legal information. 80 Fed. Reg. at 33,934/2-35/2.

Nor does the 1970 legislative history of section 7410(a)(2)(H)(ii) upon which Industry Petitioners rely support their argument. As explained in *US Magnesium,* 690 F.3d at 1167, that legislative history does not apply to the later-enacted section 7410(k)(5). Indeed, the "any requirement" criterion in section 7410(a)(2)(H)(ii) was not added until 1977, further undermining the relevance of the 1970 legislative history. *See* 80 Fed. Reg. at 33,935/1.

Petitioners compare section 7410(k)(5) with sections governing EPA approvals of SIP submissions, 42 U.S.C. § 7410(k)(3) (requiring that SIPs meet "all of the applicable requirements of this chapter") and of SIP revisions, *id.* § 7410(*l*) (providing that EPA "shall" not approve a SIP revision if it would "interfere with … any other applicable requirement of this chapter"). State Br. 12-14; Ind. Br. 23. They argue that the subsection (k)(3) and (*l*) standards are less stringent than that under section 7410(k)(5), and that a substantial inadequacy finding must therefore require a fact-specific factual demonstration of adverse impacts from deficient provisions, such as a NAAQS violation. EPA

explained that these three provisions are ambiguous in relevant parts, that they each operate in different contexts, and the showing each requires may vary depending upon the context. 80 Fed. Reg. at 33,941/1-42/2. Also, EPA explained that section 7410(k)(5) does not impose a "per se 'higher'" standard than that in section 7410(*l*), and that this comparison provides no support for requiring the fact-specific finding Petitioners advocate for a SIP call to address legally-deficient SIP provisions. *Id.*

Notably, certain Industry Petitioners in this case argued in *Luminant* that EPA could disapprove an affirmative defense provision under section 7410(*l*) only if EPA demonstrated that NAAQS violations would result. 714 F.3d at 858. The Court rejected that argument, requiring only that the agency "provide reasoning supporting its conclusion that the disapproved provision would interfere with an applicable requirement of the Act." *Id.* This decision supports EPA's interpretation that a fact-specific showing is not required here.

There also is no merit to Industry Petitioners' argument that absent requiring fact-specific showings of harm, EPA claims "limitless" authority to issue SIP Calls, potentially based on the most

trivial of legal defects in a SIP. Ind. Br. 27-29. Simply put, EPA has not asserted any such "limitless" authority and this case certainly does not concern trivial matters. EPA has reasonably construed the term "substantially inadequate" to include SIP provisions that fail to meet "fundamental" CAA requirements, and has explained why the CAA requirements at issue are fundamental in nature, essential to the very integrity of the SIP process.

Citing regulations applicable to SIPs, State Petitioners contend EPA could have amassed data to make State-by-State, fact-specific findings that the SIP-called provisions have caused adverse effects such as NAAQS violations, and that this negates EPA's conclusion that such findings are not required for the SIP Call. However, even assuming such fact-specific information were available, EPA reasonably explained that because legally-deficient SIP provisions are at issue, it did not need to document instances in which each of the deficient provisions may have caused a NAAQS violation, skirted SIP revision requirements, subverted a specific enforcement action, or impinged on court jurisdiction in such an action. *See, e.g.*, 80 Fed. Reg. at 33,926/2-3, 33,931/3-37/1. EPA's approach was upheld in *US Magnesium*, 690 F.3d

at 1168, and is supported by *Luminant*, 714 F.3d at 858, and *Georgia Power Co.*, 443 F.3d at 1355.

State Petitioners also err in suggesting that information is always available to support imposing the type of factual threshold they advance. EPA explained that adequate and reliable information linked to deficient SIP provisions may not be available, and that even where information may be available, making the showing Petitioners demand would be very difficult, and requiring such a showing could lead to absurd results. *See, e.g.,* 80 Fed. Reg. at 33,939/1-2; *supra* at 18-19. Moreover, one of EPA's objectives for the SIP Call is to ensure that all States are properly accounting for emissions in emissions inventories and SIP planning. 80 Fed. Reg. at 33,949/1-52/1.

State Petitioners consider the SIP Call "hard to imagine" given the factual claims by four state commenters. State Br. 16-17. But EPA considered these comments. EPA responded to Georgia that the frequency of SSM events does not alter the requirement that emission limitations be continuous. 80 Fed. Reg. at 33,936/3-37/1; RTC at 46 (JA1158). EPA responded to South Dakota that legal requirements, such as continuous emission limitations, apply regardless of attainment

status. 80 Fed. Reg. at 33,947/2-48/3. Responding to Delaware, EPA explained why the State cannot unilaterally revise SIP provisions. *Id.* at 33,919/2-20/1; 33,922/2-23. Regarding Arizona, EPA responded that there is no legal basis for affirmative defense provisions, regardless of whether any source had "formally" invoked them. 79 Fed. Reg. at 55,935/2; 80 Fed. Reg. at 33,859/2-3.

State Petitioners highlight that SIP-called provisions in Florida, South Dakota, and Kentucky date back many years. But EPA acknowledged this and explained its ongoing efforts to rectify past mistakes by both States and EPA. 80 Fed. Reg. at 33,843/2-44. EPA's subsequent approval of other SIP submissions from these States in the interim does not negate EPA's section 7410(k)(5) authority to find the provisions here legally-deficient. *Id.* at 33,948/3-49.

State Petitioners further assert (Br. 18) that EPA's approach to affirmative defense provisions illustrates the "irrelevance" of factual findings to the SIP Call. What is relevant is that such provisions are inconsistent with the Act's enforcement structure in sections 7413 and 7604 and the authority of courts to find liability and assess statutory remedies. *Id.* at 33,851/3-53/1. State Petitioners claim that Texas'

affirmative defense "balances" air-quality protection with the "reality of SSM periods," but this purported balancing is no different from that which this Court found impermissible in EPA's regulations in *NRDC*, 749 F.3d at 1064. *See* 79 Fed. Reg. at 55,933/3-34/1.

State Petitioners wrongly assert (Br. 17) that correcting deficient SIP provisions will encourage States to "loosen" emission limitations. The different ways States may elect to rectify the existing deficient provisions will not necessarily result in more emissions. To the contrary, EPA will evaluate SIP revisions in response to the SIP Call against applicable CAA requirements, including technological feasibility and the applicable NAAQS. *See, e.g.,* 80 Fed. Reg. at 33,955/3-56 & 33,912/1-2.

Finally, State Petitioners argue (Br. 15) that EPA merely "hypothesized" about impacts of the deficient SIP provisions rather than considering real world impacts. Although the analysis Petitioners demand is not required, EPA considered examples of the real-world impacts resulting from the types of SIP deficiencies at issue in this case. *See, e.g.*, 80 Fed. Reg. at 33,850 & n.21, 33,953/1; Sierra Club Comments at 28-35 (explaining how communities are affected by

deficient SIP provisions, with no legal recourse to protect themselves) (JA719-26); *supra* at 18-19. This further underscores the reasonableness of the SIP Call.

2. A SIP Call May Be Based Upon Particular Legally-Deficient SIP Provisions.

Industry Petitioners argue that legal deficiencies in specific SIP provisions cannot form the basis for a SIP Call for those provisions unless EPA determines that the SIP "as a whole" is insufficient to attain or maintain the NAAQS. Ind. Br. 24-26. They premise this argument on three cases: *Train v. NRDC,* 421 U.S. 60 (1975); *Association of Irritated Residents v. EPA*, 686 F.3d 668 (9th Cir. 2011); and *Virginia*, 108 F.3d 1397. None of these cases support Petitioners' claims.

In *Virginia* this Court held a SIP call invalid because EPA impermissibly dictated the particular emission controls that States must adopt. 108 F.3d at 1409-15. Here, EPA did no such thing, but rather provided comprehensive guidance concerning a range available options as States remedy the inadequate provisions. *See, e.g.*, 80 Fed. Reg. at 33,976/2-82/2. So long as States comply with applicable CAA procedural and substantive requirements, they have discretion to revise

the provisions as they think most appropriate. *See, e.g.*, *id.* at 33,947/1-2.

Train involved questions associated with the mix of control measures a State can permissibly adopt to assure that the applicable NAAQS are attained and maintained. EPA agrees with the principle that States have discretion in choosing the mix of control measures that are necessary for NAAQS attainment purposes. However, as recognized in *Train*, that discretion is subject to the obligation to meet statutory requirements for SIPs. State discretion does not extend to overriding CAA requirements. *Id.* at 33,937/2-3.

Industry Petitioners (Br. 26) misconstrue *Association of Irritated Residents*, claiming that EPA opined that a SIP call should be issued only if the SIP as a whole is substantially inadequate. The relevant portions of that case, however, involved whether a SIP submission to demonstrate that the SIP would attain the NAAQS was approvable under section 7410(k)(3). 686 F.3d at 671, 674-77. That inquiry considered whether a previously-approved attainment demonstration for the ozone NAAQS resulted in attainment. *Id.* The "otherwise comply" provision of section 7510(k)(5) was not at issue.

If Petitioners intend their "as a whole" argument to mean that the entire SIP must fail to meet CAA requirements before EPA can promulgate a SIP call, it is plainly nonsensical. By referring in section 7410(k)(5) to "any requirement of this chapter," Congress clearly did not mean that every provision in a SIP must fail to comply with CAA requirements, and section 7410(k)(5)'s use of the general term "implementation plan" does not in context suggest otherwise. Moreover, EPA did review the relevant, related provisions in the SIPs at issue before determining that the SIP-called provisions are, in context, substantially inadequate and thus warrant the SIP Call. *See, e.g.*, *supra* Argument I(C).

Finally, Industry Petitioners, citing North Carolina's comments, argue that SIPs of some affected States may contain provisions that negate the identified deficiencies and which EPA allegedly overlooked. Industry Br. 20-21. This is simply not correct. EPA did analyze related provisions. More importantly, EPA proceeded through full notice and comment, providing commenters the opportunity – and obligation, if they wished to preserve the issue for judicial challenge, 42 U.S.C. § 7607(d)(7)(B) – to identify any related provisions that might affect

EPA's interpretation. Where commenters identified such other provisions, EPA addressed their claims. *See supra* Argument I(C) (explaining that general duty-type provisions raised by North Carolina and others do not remedy SIP-called provisions). Petitioners may not now challenge EPA's authority based upon alleged "other" SIP provisions not raised during the public comment process and in Petitioners' opening briefs.

Moreover, this entire line of argument is flawed in other respects. 80 Fed. Reg. at 33,943-44. If EPA could not identify such other SIP provisions, then it is unlikely that the regulated community, regulators, citizens or courts would be able to identify such provisions as well. *Id.* at 33,943/3. Further, if EPA overlooked some other SIP provision that legitimately rectifies the legal deficiency in the SIP-called provision, then States should not object to revising their SIPs to clarify the deficient provisions. *Id.* at 33,943/2.

3. EPA Reasonably Construed its SIP Call Authority to Address Ambiguous Provisions that May Be Construed to Violate Fundamental CAA Requirements.

State Petitioners argue that EPA's construction of section 7410(k)(5) is unduly expansive because the Agency contends that it may

issue SIP calls for ambiguous SIP provisions. State Br. 19 (citing 80 Fed. Reg. at 33,926).

The Court, however, need not resolve whether EPA may issue SIP calls merely because SIP provisions are ambiguous in the abstract. EPA concluded that each of the SIP-called provisions do not comply with fundamental CAA requirements, and reasonably explained why. For those SIP provisions where lack of clarity was a part of why the provisions are deficient, EPA articulated that in its proposed SIP Call. *See, e.g.*, 78 Fed. Reg. at 12,506/2-3 & 12,504/2-3. Where commenters disputed EPA's understanding of a particular SIP provision, EPA responded and explained why it reads the particular provisions subject to the SIP Call to be inconsistent with the Act's requirements. *See, e.g.*, 80 Fed. Reg. at 33,962/2 (Florida). Where commenters confirmed EPA's understanding that particular provisions do not violate fundamental CAA requirements, they informed EPA's decision not to issue a SIP call for the provision. *See, e.g.*, *id.* at 33,923/3.

Where ambiguity of a SIP provision is an important part of the basis for the SIP Call, EPA reasonably interpreted its authority to extend to such instance. *Id.* at 33,926/3-33,927/1. Ambiguities that can

undermine proper enforcement of SIP provisions are not "trivial" matters. The Tenth Circuit concluded that EPA has authority to issue a SIP call "in order to clarify language in the SIP that could be read to violate the CAA." *US Magnesium*, 690 F.3d at 1169. The provision at issue appeared to authorize state officials to determine unilaterally that excess emissions are not "violations" in a manner that a court could interpret to preclude enforcement by EPA or citizens. Given the "potential conflicts" between the SIP provision and CAA requirements, the court held that "seeking revision of the SIP was prudent, not arbitrary and capricious." *Id.*

EPA explained the importance of rectifying ambiguous SIP provisions: to ensure that the regulated community, public, regulators and courts can rely upon the provisions to achieve their purposes, and to prevent frustrating effective enforcement. 80 Fed. Reg. at 33,926/3-27/1; 33,885/1; 33,886/2. Moreover, if a State concludes that it does not intend the interpretation EPA found inconsistent with the Act, it can correct that ambiguity by changing the provision to clarify it consistent with CAA requirements. *Id.* at 33,924/1. If the State intended the interpretation EPA found legally-deficient, this would confirm the

reasonableness of EPA's "prudent" approach of issuing a SIP call to rectify the ambiguity. *US Magnesium,* 690 F.3d at 1170.

Finally, Petitioners' attempt to undermine EPA's authority to issue SIP calls for ambiguous provisions, by pointing to EPA's position regarding the use of state interpretative letters to resolve ambiguity when EPA approves a SIP submission, lacks merit. State Br. 20-21. EPA explained that such letters may be utilized to resolve uncertainty in limited circumstances when included in the administrative record and addressed in the Federal Register when EPA is *initially evaluating* a SIP provision for inclusion in the SIP, so that there is a "shared state and EPA understanding," 80 Fed. Reg. at 33,885/2, on which the public, regulated community, regulators and courts alike may confidently rely. *Id.* at 33,885/2-87. This process establishes a contemporaneous, memorialized interpretation, reducing ambiguities in SIP provisions when EPA first approves them as part of a State's SIP. *Id.* at 33,887/3. EPA explained that reliance on after-the-fact interpretive letters would not be appropriate, *id.* at 33,888/1, a point not challenged in this case. EPA also clearly explained that States must submit SIP submissions meeting applicable CAA requirements in response to the SIP Call. *Id.* at

33,930/2-31. Therefore, EPA's position on interpretive letters does not contradict its authority to issue SIP calls to rectify provisions later determined to be ambiguous.

4. The SIP Call Is Consistent with the Federal/State Balance in the Act.

Petitioners argue EPA upsets the Act's state/federal balance by allegedly overstepping its authority under section 7410(k)(5). State Br. 21; Ind. Br. 29. While EPA agrees that States have primary authority to choose the mix of pollution controls that will meet the Act's air quality goals, it is EPA's responsibility to assure that SIPs meet the Act's legal requirements. *Union Electric*, 427 U.S. at 256-69. As EPA aptly put it: "The states have broad discretion in how to create SIP provisions but must do so consistent with CAA requirements." 80 Fed. Reg. at 33,860. EPA identified specific deficient SIP provisions, and required States to address those deficiencies, but "EPA is not in any way compelling states to impose any specific SIP control measure on any specific source …." *Id.* As *Union Electric* makes clear, Congress specified this role for EPA under the Act. *See also Browner*, 230 F.3d at 185 ("Although the CAA grants states considerable latitude, it 'nonetheless subjects the states to strict minimum compliance requirements,' adherence with which must

be determined by the EPA." (quoting *Union Electric Co.*, 427 U.S. at 256-57)).

Petitioners imply that *Train* provides States with carte blanche in formulating SIPs. Significantly, Industry Petitioners (Br. 4, 25) omit the relevant text from that Supreme Court decision, which speaks to EPA's authority. For example: "The Act gives the Agency no authority to question the wisdom of a state's choices of emission limitations *if they are part of a plan which satisfies the standards of § 110(a)(2) ...* ." 421 U.S. at 79 (emphasis added). *See* 80 Fed. Reg. at 33,877/1-79. EPA's SIP call authority for SIP provisions that fail to comply with fundamental CAA requirements in section 7410(a)(2) or other sections of the Act is therefore consistent with *Train* and the structure of cooperative federalism embedded within the SIP process. Similarly, because States retain broad discretion regarding how to correct the deficient provisions in a manner that complies with the applicable requirements of the Act, *see, e.g.*, 80 Fed. Reg. at 33,947/1-2, EPA's decision is also consistent with *Virginia,* 108 F.3d at 1410, 1414. *See Michigan v. EPA*, 213 F.3d at 686-88 (D.C. Cir. 2000) (where State retains options, a SIP call does not violate *Virginia*). Petitioners ignore EPA's clear explanation of why

the SIP Call is consistent with these decisions. *See, e.g.*, 80 Fed. Reg. at 33,877/1-79/3; Legal Mem. at 1-3 (JA408-10).

5. Petitioners' Costs and Benefits Argument Is Barred and, in Any Event, Meritless.

Industry Petitioners finally argue that EPA erred by not considering "costs and benefits" in making its substantially inadequate findings, thereby rendering EPA's action arbitrary and capricious. Ind. Br. 33-36. This argument fails for several reasons.

a. Petitioners' Claims are Waived.

EPA conducted a cost analysis required by Executive Order 12866, the Regulatory Flexibility Act, and other statutes. 80 Fed. Reg. at 33,984-85 & 33,883/2-84/2. Recognizing there is generally no private right of action to enforce these requirements,[43] Petitioners do not claim that EPA's cost analysis was inadequate for the purposes it was conducted. Instead, they argue that EPA should have considered "costs and benefits" in some way under section 7410(k)(5) to determine

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[43] *See* Executive Order 12866, Section 10 (58 Fed. Reg. 51,735 (Oct. 4, 1993)) ("This … does not create any right or benefit, substantive or procedural, enforceable … against the United States ...."); *Nat'l Ass'n of Homebuilders v. EPA*, 682 F.3d 1032, 1041-42 (D.C. Cir. 2012) (discussing very limited available review of Regulatory Flexibility Act compliance); *Michigan*, 213 F.3d at 689 (rejecting Regulatory Flexibility Act claim for a SIP call).

whether the identified SIP provisions were "substantially inadequate." They further contend that EPA's analysis was insufficient for this purpose because it focused on the direct costs to States to revise the SIP-called provisions, but did not include potential costs to States "to develop new emission limitations to apply during SSM periods" or potential costs changed state regulations "would impose on industry," Ind. Br. 33, thus rendering EPA's substantially inadequate finding arbitrary and capricious. *Id.* at 34-35. Petitioners base their argument that such consideration is required on *Michigan v. EPA*, 135 S. Ct. 2699 (2015) ("*Michigan (S.Ct.)*"), a decision that post-dated the SIP Call.

No commenter on the proposal, however, specifically claimed that a requirement to consider "costs and benefits" was either explicit or implicit in section 7410(k)(5), or in the CAA requirements with which the deficient SIP provisions fail to comply. Accordingly, Petitioners are barred from raising such a claim now. *See* 42 U.S.C. § 7607(d)(7)(B); *Util. Air Regulatory Grp. v. EPA*, 744 F.3d 741, 745-47 (D.C. Cir. 2014); *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 137-38 (D.C. Cir. 2015) (claim that EPA lacks authority waived because not raised in comments). While Petitioners may point to comments raising concerns

generally about the burdens they believe the SIP Call will impose or alleged failures to comply with various Executive Orders and other statutes, they did not raise the claim that section 7410(k)(5) requires EPA to consider "costs and benefits" as a basis for "substantially inadequate" findings. Because this objection was not raised with "reasonable specificity," it is barred under section 7607(d)(7)(B).

A "general" challenge is not enough. *Mossville Envtl. Action Now v. EPA*, 370 F.3d 1232, 1238 (D.C. Cir. 2004). Objections must "be prominent and clear enough to place the agency 'on notice,' for [the] EPA is not required to cull through all the letters it receives and answer all of the possible implied arguments." *National Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1231 (D.C. Cir. 2007) (internal quotation marks omitted); *see Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 655 (D.C. Cir. 2011) (to be preserved, arguments in comments must be "forcefully present[ed]") (citation omitted); *Mingo Logan Coal Co. v. EPA*, No. 14-5305, 2016 WL 3902663 (D.C. Cir. July 7, 2016), at *9 (Mingo Logan "forfeited that argument because it failed to detail the costs in a way that the EPA *could* do what Mingo Logan *now* says it *should* do.") (emphasis in original) & *6-9.

Petitioners' reliance on *Michigan (S.Ct.)*, which post-dates the SIP Call, as the basis for their "costs and benefits" argument serves only to emphasize that this objection was not raised during the comment period. Petitioners' remedy was to present this new claim to EPA pursuant to section 7607(d)(7)(B), which they have not done. They cannot raise it for the first time to this Court.

b. EPA Reasonably Construes the Relevant Provisions of the Act to Preclude Petitioners' "Costs and Benefits" Consideration for the SIP Call.

Even were this issue properly before the Court, Petitioners' claims are meritless. Nothing in section 7410(k)(5) expressly requires that EPA conduct the analysis Petitioners demand as part of its "substantially inadequate" findings. Rather, EPA's authority to consider benefits or costs under section 7410(k)(5) is dependent upon the particular statutory grounds at issue in the section 7410(k)(5) finding of substantial inadequacy and the substantive CAA requirements relevant to the finding. *See Michigan*, 213 F.3d at 674-79 (construing section 7410(a)(2)(D)(i)(I) in connection with a SIP call). EPA based the present SIP Call on the failure to comply with specific CAA requirements. Given the nature of the particular requirements at issue, EPA reasonably

construes the Act to preclude it from considering "costs and benefits" for this SIP Call.

For example, EPA based its conclusion that emission limitations must be "continuous" on the plain text of section 7602(k) and this Court's decision in *Sierra Club*, 551 F.3d at 1027-28. *See supra* Argument I(A). The Act does not excuse States from meeting this fundamental requirement based upon weighing "costs and benefits." While some cost analysis may, depending upon the applicable criteria, be relevant when a State determines what an emission limitation should be, it is irrelevant to the requirement that emission limitations be continuous. Similarly, States may not unilaterally revise SIP provisions without observing key CAA requirements of the Act, such as notice and comment, or EPA review and approval, to ensure SIP provisions remain consistent with the Act's requirements. *See supra* at 5-10, 52-53 (discussing requirements). And EPA cannot waive these statutory requirements based upon consideration of "costs and benefits." The requirements of sections 7413 and 7604, and of *NRDC,* 749 F.3d at 1062-63, that preclude affirmative defense provisions that infringe upon the federal courts' authority to determine when violations

occur, and to impose appropriate statutory remedies, apply regardless of Petitioners' "costs and benefits" consideration. Even if any of these statutory SIP requirements were ambiguous, they do not preclude EPA's reasonable interpretation that compliance with them cannot be excused based upon the claim advanced by Petitioners.

Nothing in *Michigan (S.Ct.)* precludes EPA's reasonable construction. At issue in that case was an EPA rule regulating hazardous emissions from power plants pursuant to section 7412, and EPA's determination under section 7412(n)(1)(A) that it was "appropriate and necessary" to list power plants for regulation under section 7412. The Supreme Court found that the phrase "appropriate and necessary" does not necessarily require the consideration of costs. 135 S.Ct. at 2707 ("There are undoubtedly settings in which [that] phrase ... does not encompass costs."). Rather, the Court rejected EPA's interpretation not to consider costs under that phrase, based upon the Court's assessment of the particular statutory context of that phrase (*i.e.*, assessing "whether" to regulate power plants at all, *id.* at 2707-08) and the express statutory requirement that EPA consider "costs of such technologies" in a study under section 7412(n)(1)(B), *id.* at 2708, which

EPA agreed was relevant to its "appropriate and necessary" determination. *Id.* Petitioners also wrongly suggest that *Michigan (S.Ct.)* required EPA to consider "costs and benefits" under section 7412(n)(1)(A) in a particular way; rather, the Supreme Court left it "up to the Agency to decide … how to account for cost." *Id.* at 2711.

Unlike *Michigan (S.Ct.),* the "any requirement" grounds in section 7410(k)(5) together with the applicable CAA requirements with which the deficient SIP provisions fail to comply do not incorporate "costs and benefits" considerations.[44] The Supreme Courts' guidance in *Michigan (S.Ct.)* and *Whitman* applies here: "where the [CAA] expressly directs EPA to regulate on the basis of a factor that on its face does not include cost, the Act normally should not be read as implicitly allowing the

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[44] Petitioners do not identify any term they believe incorporates costs. The only text arguably close to that at issue in *Michigan (S.Ct.)* is in section 7410(a)(2)(A), which provides that SIPs shall include "enforceable emission limitations and other control measures, means, or techniques … as may be necessary or appropriate to meet the applicable requirements of [the Act] …". As explained *supra* at 48-50, while the reference to "necessary or appropriate" may afford States discretion not to regulate a source, for those it chooses to regulate in its SIP, section 7602(k) and *Sierra Club* require that any emission limitations imposed must apply continuously. *See also* 80 Fed. Reg. at 33,902-03/1. Nothing in these provisions incorporates consideration of "costs and benefits" into the SIP Call findings in this case.

Agency to consider cost anyway." *Id.* at 2709 (explaining *Whitman v. American Trucking Associations*, 531 U.S. 457, 467 (2001) ("We have therefore refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted.")).

Michigan (S.Ct.) is inapposite for another reason. The EPA regulations in that case apply directly to sources, whereas the concerns Petitioners raise result from state regulation and choices States may or may not make in responding to the SIP Call. In the SIP Call, where EPA found the deficient SIP provisions do not comply with fundamental CAA requirements, EPA's role is limited to assessing whether a State's regulatory choices meet the requirements of the Act, without regard to the economic burdens those state decisions may impose. This is consistent with the state-federal relationship in the SIP process, where States have discretion to select the mix of controls for inclusion in their SIPs, provided they comply with the Act's requirements. The SIP Call does not restrict the States' discretion under the Act to choose

> how to revise the SIP provision in question to make it consistent with CAA requirements and of determining, among other things, which of several lawful approaches to the treatment of excess emissions during [startup, shutdown

> and malfunction] events will be applied to particular sources.

80 Fed. Reg. at 33,883/3.

Just as EPA here cannot dictate the measures States adopt in response to the SIP Call, *Virginia,* 108 F.3d. at 1409-15; *see Train*, 421 U.S. at 78-70, EPA cannot be required to consider how States will regulate their sources in response to the SIP Call, including alternatives States may or may not choose to impose. This federal-state relationship applies even where the underlying applicable CAA requirements allow EPA to consider costs in certain ways. Thus in *Michigan v. EPA,* 213 F.3d at 685-89, a SIP call case in which EPA considered certain costs when defining "significant contribution" for purposes of measuring compliance with section 7410(a)(2)(D)(i)(I), this Court upheld EPA's approach because, in accordance with *Train* and *Virginia*, States retained discretion to choose how to achieve the required reductions for that provision in response to that SIP call. *Id.* at 687.

For similar reasons, Petitioners' arguments conflict with the Supreme Court's conclusion in *Union Electric,* 427 U.S. at 256-66, that EPA's oversight role is limited to reviewing SIPs for compliance with

the Act's requirements, and that claims of economic or technological infeasibility regarding impacts on sources from state regulatory choices are irrelevant to this determination. Petitioners ask that EPA overlook legal deficiencies in SIPs because States *might* respond to the SIP Call with SIP revisions—such as alternative emission limitations for startup and shutdown—that *might* impose costs that the regulated community deems excessive. Those considerations, however, are properly left to the States themselves to weigh in the SIP development process. *Id.* at 266-69. While *Union Electric* arose in the SIP approval as opposed to the SIP call context, there is no logical reason why its ruling as to the respective state and federal roles under the Act should not apply here. Indeed, this Court in *Michigan v. EPA,* 213 F.3d at 689, affirmed EPA's role in the SIP process while rejecting similar claims under the Regulatory Flexibility Act, because EPA did not consider the costs States may impose through the controls they may establish in response to EPA's SIP call in that case. *See also American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1043-44, *reh'g granted in part, denied in part on other grounds,* 195 F.3d 4 (D.C. Cir. 1999), *reversed on other grounds*, *Whitman, supra.*

Finally, EPA's interpretation is supported by the fact that EPA cannot reasonably anticipate which sources may be affected, and what the costs on them may be, due to unknown state choices in response to the SIP Call. For example, EPA cannot anticipate whether States with automatic exemption provisions will decide only to delete the exemptions, or to adopt valid alternative emission limitations for certain modes of operation at certain sources, or instead to overhaul the emission limitations entirely. For the same reason, EPA cannot assess potential resulting costs from such state choices. In response to the SIP Call, these choices, including consideration of relative costs and benefits, are properly preserved for the States, subject only to the necessity that those choices comply with the Act's requirements. Although Petitioners may argue that EPA could make illustrative predictions of what the hypothetical costs may be, even were that true, the inherent uncertainties in such predictions would render them unsuitable for incorporating into section 7410(k)(5) findings, underscoring the reasonableness of EPA's interpretation.

c. EPA Reasonably Did Not Consider the "Costs and Benefits" Industry Petitioners Claim.

Even if EPA has discretion to consider the "costs and benefits," as Petitioners demand, EPA did not act unreasonably by not conducting such an analysis. Because EPA cannot predict how States may choose to rectify the deficient SIP provisions, EPA cannot be found arbitrary and capricious for not considering such costs. There simply is not a logical basis for assessing the compliance costs that may ultimately result from revisions States may or may not make in response to the SIP Call as a basis for making the section 7410(k)(5) findings.

EPA explained this limitation in the context of the cost-analysis it conducted for other purposes, such as the referenced Executive Orders and Regulatory Flexibility Act. 80 Fed. Reg. at 33,984-85. The Agency explained that its analysis properly considered only the direct costs imposed on affected States by the SIP Call, which costs "could include development of a state rule, conducting notice and public hearing and other costs incurred in connection with a SIP provision." *Id.* at 33,883/3; 33,883/3-84/2. EPA estimated that these direct costs for all 36 States affected by the SIP Call would total $158,220, Cost Mem. at 1 (April 28,

2015) (JA1107), and could be lower if States combine their revisions in response to the SIP Call with other revisions States must make to meet other CAA requirements. *Id.* at 2 (JA1108). EPA further emphasized that because the SIP Call "leave[s] to states the choice of how to revise the SIP provision in question to make it consistent with the CAA," 80 Fed. Reg. at 33,883/3, which includes numerous lawful options, EPA does not, and as practical matter cannot, analyze costs that may be imposed on regulated sources by any particular new regulatory approach States may elect to adopt. *Id.* In sum, EPA could not practicably consider the "costs and benefits," as Petitioners claim is required, and the lack of such an analysis for EPA's SIP Call findings was not arbitrary and capricious.

Finally, State Petitioners (Br. 22) fault EPA for underestimating their burden responding to the SIP Call, because EPA did not consider their potential costs to assess whether alternative emission limitations are appropriate for sources regulated in their SIPs and to develop those alternatives. EPA acknowledged that the decision whether to provide alternative emission limitations for certain modes of operation for any sources is the States' prerogative. 80 Fed. Reg. at 33,906/3-07/1. No

State is obligated to adopt such an approach for any sources. To the extent a State elects to do so, however, the costs of doing so are within the control of the State. EPA cannot reasonably assess what the burdens of those choices on States may entail.

For all these reasons, Petitioners' challenges to the SIP Call are meritless.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

Dated: October 28, 2016

s/ David J. Kaplan
DAVID J. KAPLAN
MATTHEW R. OAKES
DUSTIN J. MAGHAMFAR
United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
Tel: (202) 514-0997
Fax: (202) 514-8865
david.kaplan@usdoj.gov

Attorneys for Respondents

Of Counsel:

GEOFFREY L. WILCOX
PAUL BANGSER
SHEILA IGOE
STEVEN ODENDAHL
ZACHARY PILCHEN
KRISTI SMITH
JAN TIERNEY
U.S. Environmental Protection Agency
Office of General Counsel

STATEMENT OF RELATED CASES

EPA is unaware of any cases pending in this Court related to this proceeding.

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2016, a copy of the foregoing was served electronically through the Court's CM/ECF system on all registered counsel.

Dated: October 28, 2016

s/Dustin J. Maghamfar
DUSTIN J. MAGHAMFAR
Attorney for Respondents

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

I certify that this brief is proportionately spaced, has a typeface of 14 points, and contains 27,968 words, exclusive of those parts of the brief exempted by Rule 32(a)(7)(B)(iii). I have relied on Microsoft Word's calculation feature.

Dated: October 28, 2016

s/Dustin J. Maghamfar
DUSTIN J. MAGHAMFAR
Attorney for Respondents